92-908

Supreme Court, U.S.
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NO.

IN THE

Supreme Court of The United States

NOVEMBER TERM, 1992

MIKE CAPLINGER
AND
EDDY LANKFORD,
Petitioners,

V.

JANE DOE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether public school students have an *unqualified* constitutional right to be free from sexual molestation by persons employed as public school teachers.

II. Whether public school officials have an affirmative constitutional duty to protect public school students and to provide them with a safe school environment, arising from compulsory attendance laws.

NOTE: Petitioners reserve the right to argue Questions III and IV in the event that certiorari is granted on Questions I or II above, but do not include Questions III and IV among the reasons for the grant of certiorari.

III. If the right and duty described in Questions I and II exist, whether they were clearly established in 1987, when the cause of action here arose.

IV. Whether Petitioners, or either of them, were entitled to summary judgment on the grounds of qualified immunity, in this case.

PARTIES

Petitioners are Mike Caplinger and Eddy Lankford. Petitioners are two of the defendants in the underlying civil rights litigation pending in the United States District Court for the Western District of Texas, Austin Division, and were the appellants in the Fifth Circuit appeal from which this Petition for Writ of Certiorari arises.

Respondent is Jane Doe. Respondent is the plaintiff in the underlying litigation and was the appellee in the Fifth Circuit appeal from which this Petition for Writ of Certiorari arises.

Parties to the Proceedings Below:

(1) Jane Doe, Plaintiff

(2) Lynn Stroud, Defendant

(3) Taylor Independent School District, Defendant

(4) Mike Caplinger, Defendant

(5) Eddy Lankford, Defendant

Amicus Curiae in the Proceedings Below:

(1) National School Boards Association

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PETITION FOR WRIT OF CERTIORARI

Petitioners Mike Caplinger and Eddy Lankford respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered October 2, 1992, affirming the denial of Petitioners' Motion for Summary Judgment on qualified immunity grounds by the United States District Court for the Western District of Texas.

OPINION BELOW

The Opinion of the Fifth Circuit Court of Appeals affirming the denial of Petitioners' Motion for Summary Judgment is reported at 975 F.2d 137 (5th Cir. 1992) and is reprinted as Appendix A hereto. The Judgment of the Circuit Court is reprinted as Appendix B hereto. The Opinion of the District Court for the Western District of Texas is unreported and is reprinted as Appendix C hereto.

JURISDICTION OF THIS COURT

This Petition for Writ of Certiorari seeks review of the October 2, 1992, decision of the Fifth Circuit Court of Appeals wherein the court affirmed the denial of Petitioners' Motion for Summary Judgment on qualified immunity grounds.[1] Jurisdiction over this petition is conferred by 28 U.S.C. § 1254 (Supp. 1992).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983 (1981):

> Every person who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

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[1] Petitioners did not file a petition for panel rehearing or a petition for rehearing en banc.

U.S. Const. amend. XIV, §1:

> . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The time worn adage that bad facts (or the perception thereof) made bad law, is no truer than what the Court will find in this case.

This case arises out of an unfortunate set of circumstances involving inappropriate sexual conduct between a public school teacher, Lynn Stroud, and one of his students, Respondent Jane Doe. While the Fifth Circuit "tempered" its rendition of the facts with the cautionary note that it "is predictably slanted in [Respondent's] favor" for purposes of summary judgment review, (App. A-2n.2), it is a scathing rendition indeed.[2] The undisputed facts, however, show that during the 1986-87 school year Respondent, then a ninth grade student in the Taylor Independent School District (the "School District") became involved in a sexual relationship with Stroud, which lasted through the summer months and into the fall of the 1987-88 school year. The relationship

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[2] As the Third Circuit noted in *D.R. by L.R.* v. *Middlebucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1377 (3rd Cir. 1992) (en banc), *petition for cert. filed*, No. 92-816 (U.S. Nov. 9, 1992): "No one could help but be shocked by the factual allegations in this case. But in *DeShaney*, the Supreme Court rejected the 'shock the conscience' test of *Rochin* v. *California* . . . . as a standard for imposing § 1983 liability. To do otherwise would readily convert much tortious conduct into constitutional violations at the expense of a decent regard for federalism." (citations omitted)

was, at first, a flirtatious one, but with increasing pressure from Stroud it turned into a sexual one, with the first incident of sexual intercourse occurring in the spring of 1987 in Stroud's house while Respondent was spending the night with Stroud's daughter, who Respondent had befriended in order to get closer to Stroud. Thereafter, a series of sexual encounters occurred, in Stroud's home, in the school fieldhouse at night or on weekends, and on deserted country roads during the middle of the night.

During the spring of 1987, with rumors and complaints from others about a suspected relationship between Respondent and Stroud, Petitioner Lankford, Principal of Taylor High School, met with the teacher. Stroud strongly denied any form of misconduct, but Lankford warned him to stay away from Respondent. Then, in the summer of 1987, Respondent's parents presented school officials with two photographs of Stroud (with notes in his handwriting on the back of each) that they had found in their daughter's possession. At that time, Petitioner Caplinger, the Superintendent of Schools, and Petitioner Lankford interrogated Stroud at length, and he again adamantly denied the existence of a physical or otherwise inappropriate relationship between himself and Respondent. Likewise, Respondent was interviewed by Petitioner Caplinger, and she denied the existence of any such relationship with equal vigor, despite Caplinger's assurances that he would do everything he could to assist her, including going to the police, if Stroud was harming her in anyway. Faced with such denials from the parties themselves, Caplinger sought the advice of counsel and concluded that he did not have sufficient evidence to bring Stroud before the school board for a discharge hearing. Instead, he warned Stroud to not communicate with Respondent in any way, and that he would be discharged if

there was any form of inappropriate relationship between the two.

Thereafter, in the fall of 1987, Respondent's parents found additional correspondence from Stroud in her possession and, through a family attorney, Respondent eventually came forward and revealed her true relationship with Stroud. Simultaneously, another student came forward and complained to school officials that Stroud had made unwelcome sexual advances towards her also. Stroud was then suspended by Petitioner Caplinger, resigned, and pled guilty to criminal charges arising from his relationship with Respondent.

Respondent subsequently filed suit against the School District, Stroud, Caplinger, and Lankford in state district court, which was removed to federal court. As amended, Respondent's complaint alleged a claim against all of the Defendants under 42 U.S.C. § 1983 (1981); a claim against the School District only under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1990); and, pendent state law claims against Stroud only. In her Section 1983 claim, Respondent alleged that all of the Defendants "deprived Plaintiff of her right to be free from bodily harm and sexual abuse in violation of the due process and equal protection clauses of the Fourteenth Amendment." Record on Appeal, Volume II, p. 583. In addition, Respondent distinguished between the conduct of Defendants by alleging that:

> 34. Defendant Stroud acted intentionally, willfully, knowingly and purposefully, with the specific intent of depriving Plaintiff of her Fourteenth Amendment rights.
>
> 35. Defendants Lankford, Caplinger, and Taylor ISD were grossly negligent in their supervision of Defendant Stroud and in their failure to seriously

> investigate, monitor, or otherwise respond to allegations of wrongdoing by Defendant Stroud when these Defendants had actual and/or constructive knowledge of Stroud's behavior.

Record on Appeal, Volume II, p. 583.

Petitioners Caplinger and Lankford, having been sued in both their individual and official capacities, moved for summary judgment on the basis of their qualified immunity from suit.[3] In their Motion, Petitioners argued that they were entitled to qualified immunity as to Petitioner's Section 1983 claims since Petitioner was not deprived of any clearly established constitutional right. In addition, Petitioners argued that they had no affirmative duty to protect Petitioner from Stroud and that, in any event, their conduct was objectively reasonable under the circumstances.

The district court ultimately rejected the Petitioners' position and denied their Motion for Summary Judgment. *See* Appendix C. Thereafter, the Petitioners appealed the court's denial of their Motion for Summary Judgment to the Fifth Circuit Court of Appeals.[4]

On appeal, the Fifth Circuit affirmed the district court's decision and remanded the case for trial on the merits. *See* Appendix A. In its Opinion, the Fifth Circuit held that public school students — like the Respondent — enjoy a "firmly established constitutional right under the due process and equal protection clauses of the Fourteenth Amendment to be free from sexual molestation by a state-employed

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[3] The School District also moved for summary judgment. However, the denial of the District's motion is not at issue in the instant appeal.

[4] An order denying qualified immunity from suit is "an appealable 'final decision' within the meaning of 28 U.S.C. § 1291, notwithstanding the absence of a final judgment." *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985).

school teacher." App. A-2. In addition, the court held that Petitioners Caplinger and Lankford "*had* an affirmative, constitutionally-based duty to protect [Respondent] from such an intrusion into her bodily integrity," arising from the Texas compulsory school attendance law. App. A-2. Stated in other words, the court concluded that "public officials have a duty to police the misconduct of their subordinates and to protect schoolchildren from hazards of which the school officials know or should know." App. A-21. And in still other words, that "school superintendents and principals have a duty to police the halls of our public schools to insure that schoolchildren, who are obliged to attend, have an opportunity to learn and study in a school environment free from sexual molestation and harassment." App. A-25. Finally, consistent with the note of condemnation sounded in its rendition of the facts and the sweeping nature of its holding, the circuit court entered the following, most unusual Judgment:

> . . . It is now hereby ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed, and the cause is remanded to the District Court for trial so that a jury can decide *whether Superintendent Caplinger and Principal Lankford should be granted an "excused absence" with respect to their response to Jane Doe's predicament.*

App. B-1,2 (emphasis added).

REASONS FOR GRANTING THE WRIT

The problem of sexual misconduct in our schools is not a new one, any more so than sexual harassment in the workplace or sexual misconduct in our society, generally. What is new, however, is the evolving effort to affix civil rights liability for such misconduct on persons other than the aggressor (who typically is liable at common law but has no

deep pocket), and to turn public school officials into insurors against and policeman of the sexual indiscretions of public school teachers and students.

The opinion of the Fifth Circuit in this case is a sweeping one. The court first holds that public school students have an *unqualified* constitutional right to be free from sexual molestation by persons employed as public school teachers, regardless of where or when the molestation may occur, on or off school property or during school or nonschool time, and regardless of the nature of the students' involvement or their interaction with school officials. The court then holds that school officials have an affirmative constitutional duty to protect students from such harm and to provide them with a safe school environment, based on a special relationship of "functional custody" arising from compulsory school attendance laws. "By removing the child from his home, even when the child's best interests lie in such action, the state thereby obligates itself to shoulder the burden of protecting the child from foreseeable trauma." App. A-18,19. "Separated from his or her parents (guardians), the child's safety and well-being are entrusted to school officials." App. A-21. Thus, while parents themselves cannot be held liable for their failure to protect their own children, school officials can be. This, according to the Fifth Circuit, is somehow an extension of "what many would dub 'family values.' " App. A-18.

The significance of the breadth of the Fifth Circuit's decision and its impact on public schools, public school officials, and local taxpayers cannot be overstated. Not only does it create new law which effectively precludes summary judgment on qualified immunity grounds in all cases involving sexual abuse by teachers, exposing school officials to open-ended liability for the sexual misconduct of their subordinates, but it opens still other doors to a wide range of

liability for any variety of injuries that can be said to have resulted from the improper supervision of school employees. An affirmative constitutional duty to provide a safe school environment, as articulated by the Fifth Circuit, would appear to have no bounds.

As will be shown below, "special and important reasons" exist for a grant of writ of certiorari in this case for the traditional reasons set forth in Rule 10.1(a) and (c) of the Supreme Court Rules. "Special and important reasons" also exist, however, as a matter of public policy. Are public school officials to become the protectors of our nation's schoolchildren from sexual abuse and other forms of harm they may suffer arising directly or indirectly from their school attendance, based on a duty to provide a safe school environment? And if they are, under what specific circumstances can school officials be held liable for the breach of such a duty? In the face of the broad nature of the Fifth Circuit's decision in this case, school officials across the country must look to this Court for guidance.

I. There Is A Conflict Among The Circuits Regarding Whether Public School Students Have An *Unqualified* Constitutional Right to Be Free From Sexual Molestation By Persons Employed As Public School Teachers.

While this Court has never expressly addressed the issue, Petitioners do not dispute that public school students arguably enjoy a constitutional right to be free from sexual molestation by a state-employed school teacher which occurs during the course of school attendance or school related activities.[5] However, in its zeal to announce this "patently

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[5] For the record, Petitioners do dispute that the right is a "clearly established" one. Surely a constitutional right is not "clearly established" within the meaning of *Harlow* v. *Fitzgerald*, 457 U.S. 808, 818 (a public official is entitled to qualified

obvious" constitutional principle, the Fifth Circuit went one step too far. The Fifth Circuit has declared that students enjoy a constitutional right to be free from *all* sexual molestation, regardless of where or when, or under what circumstances, the sexual molestation occurs.

In its opinion, the Fifth Circuit tracks, in painstaking detail, the location of Respondent's various encounters with Defendant Stroud. App. A-2-7. While, admittedly, the relationship between Respondent and Stroud had its genesis in the school, the sexual misconduct over which Respondent sues was largely carried out away from the school and the school day. The instances of sexual intercourse occurred in Stroud's home, at the school fieldhouse at night or on weekends, and on deserted country roads in the middle of the night. Moreover, some of the displays of apparent affection between Respondent and Stroud that caused rumors to circulate (which the Fifth Circuit stated that Caplinger and Lankford did not take adequate notice of), took place during community or non-school activities, and in the summer months. When Respondent's parents first approached school officials with their concerns, that was in the summer, as well.

The Fifth Circuit gives no indication that incidents occurring away from the school or school activities are in any way distinguishable from incidents occurring during the school day. In effect, the Fifth Circuit has read into the Constitution a "right" which holds public school officials responsible for the private lives of school employees and students, all day, every day, year round. Petitioners submit that such an

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immunity "insofar as [his] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"), if an official must first analyze and extrapolate from an expansive body of Section 1983 case law to determine whether the right, in fact, exists.

unqualified right to be free from sexual molestation, at any time, is far from "clearly established."

According to the Fifth Circuit, a student's constitutional right to be free from sexual abuse necessarily follows from the principles announced in *Ingraham* v. *Wright*, 430 U.S. 651 (1977), and its progeny. *See, e.g., Fee* v. *Herndon*, 900 F.2d 804 (5th Cir. 1990); *Jefferson* v. *Ysleta Indep. Sch. Dist.*, 817 F.2d 303 (5th Cir. 1987); *Woodard* v. *Los Fresno Indep. Sch. Dist.*, 732 F.2d 1243 (5th Cir. 1984); *see also Cunningham* v. *Beavers*, 858 F.2d 269 (5th Cir. 1988); *Hall* v. *Tawney*, 621 F.2d 607 (4th Cir. 1980). In its opinion, the Fifth Circuit reasons that "[i]f it is unconstitutional for a public school teacher to tie a child to a chair [citing *Jefferson*], or to arbitrarily paddle a student on his behind [citing *Woodard*], and if a state may not intentionally assault a person without justification, then surely it is unconstitutional for a public school teacher to sexually molest a schoolchild." App. A-10,11. The court goes on to conclude that "reasonable officials would have understood the 'contours' of a student's right to bodily integrity . . . to encompass a student's right to be free from sexual assaults by his or her teachers." App. A-11.

The Fifth Circuit's reasoning is flawed in one critical respect: the court has glossed over the fact that sexual molestation, unlike corporal punishment, may occur off campus during nonschool time, as in the case at bar.[6] This distinction is not an unimportant one. To suggest, as the Fifth

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[6] Indeed, each of the corporal punishment cases cited by the court involved conduct which occurred on campus, during school hours. *Fee* v. *Herndon*, for example, involved the alleged beating of a special education student by the school principal which was observed by the student's classroom teacher. Likewise, in *Jefferson*, an elementary student was tied to a chair with a jump rope by his classroom teacher for two consecutive school days.

Circuit has done, that school officials are responsible for safeguarding the bodily integrity of students *at all times* carries the doctrine of *parens patriae* to an untenable extreme. Under the Fifth Circuit's model, which includes both the right to be free from sexual molestation and an affirmative duty to protect (discussed, *infra*), school officials, rather than parents, would bear the ultimate responsibility for the safety and well-being of school-aged children.[7]

The Fifth Circuit's failure to acknowledge the distinction between sexual molestation which occurs in connection with school attendance and that which does not is significant for another reason, as well. By suggesting that school officials are responsible for the sexual molestation of students regardless of where, when or under what circumstances the molestation occurs, the Fifth Circuit has effectively eliminated the "under color of law" element from the plaintiff's prima facie case.[8] That is, the Fifth Circuit has removed the plaintiff's

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[7] In fact, the Fifth Circuit's model runs counter to a long line of Supreme Court jurisprudence acknowledging parental responsibility for the upbringing and well-being of children. *See Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of western civilization reflect a strong tradition of parental concern for the nurturing and the upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond a doubt as an enduring American tradition."); *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968) ("Constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."); *see also Pierce* v. *Society of Sisters*, 268 U.S. 510 (1924); *Meyer* v. *Nebraska*, 262 U.S. 390 (1922).

[8] The traditional prima facie case consists of two elements: (1) "[that] the conduct complained of was committed by a person acting under color of state law;" and, (2) "[that] this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States." *Parratt* v. *Taylor*, 451 U.S. 527 (1980), *overruled in part on other grounds, Daniels* v. *Williams*, 474 U.S. 327 (1986); *see*

burden of establishing that the alleged constitutional deprivation was achieved under color of state law. Carried to its logical extreme, the Fifth Circuit's opinion has opened the door to section 1983 claims arising from the private conduct of private individuals.

To the extent that the Fifth Circuit's opinion recognizes that students have a constitutional right to be free from sexual molestation by a teacher, regardless of the circumstances, the Fifth Circuit's opinion is in direct conflict with an opinion rendered by the Tenth Circuit. In *D.T. by M.T.* v. *Independent School District No. 16*, 894 F.2d 1176 (10th Cir. 1990), *cert denied*, ___ U.S. ___, 111 S. Ct. 213 (1990), the Tenth Circuit rejected the civil rights claims of three elementary school students who alleged that they had been sexually molested by a male teacher over summer vacation while participating in fund-raising activities for a summer basketball camp. The court reasoned as follows:

> Acts of a state officer in the ambit of his personal pursuits are not acts under color of state law. *Screws* v. *United States*, 325 U.S. 91 (1945). A state, its agencies or officials may not be assessed liability for the acts of a private individual, except by a "fair attribution" of those actions to the state. *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1987). It is uncontested in our case that on June 13-14, 1984, [the teacher] was under no obligation to the School District. He was then on his free or summer "vacation." As such, he had no duties or obligations owing to or functions to perform for the School District.

Id. at 1187. The court went on to liken the teacher's status to that of an off-duty policeman, "except that [the teacher] was absolutely free from all obligation or duty to [the] School

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also Collins v. *City of Harker Heights*, 112 S.Ct. 1061, 1066 (1990); *Kentucky* v. *Graham*, 473 U.S. 159, 166 (1985).

District." *Id.* at 1188. Thus, the "nexus" between the teacher and the School District was "much more tenuous" than that between an "off-duty" officer and his department or agency. *Id.*

The Tenth Circuit expressly rejected an argument advanced by the students that the alleged constitutional deprivations were "fairly attributable" to the School District because of the "cloak of authority" held by a teacher:

> If the "extra curricular" activity had a real "nexus" to the duties and obligations owing by [the teacher] to [the] School District, we would agree with plaintiffs. However, such is simply not the case. Here, the plaintiffs voluntarily participated with [the teacher] in basketball camp fundraising activities which were not related to school activities and, thus, not undertaken under color of state law.

Id.

The Fifth Circuit's decision, unless reversed in some measure by this Court, will legitimize the kind of claims that were expressly rejected by the Tenth Circuit in *D.T. by M.T.*. Petitioners submit that this conflict among the circuits, together with the significance of the constitutional principles at stake (*i.e.*, whether a student possesses a constitutional right to be free from sexual molestation by a teacher) are compelling reasons for this Court to exercise its certiorari jurisdiction.

II. There Is A Conflict Among The Circuits Regarding Whether School Officials Have An Affirmative Constitutional Duty To Protect Public School Students And To Provide Them With A Safe School Environment.

Having decided that public school students have a clearly established constitutional right to be free from sexual molestation, the Fifth Circuit then turned its attention to the duty

or duties owed by school officials in protecting such a right. The Court determined that school officials have a duty to police the misconduct of their subordinates, utilizing an analysis of "supervisory liability" as set forth by the Eighth Circuit in *Jane Doe "A"* v. *Special School District of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990). App. A-14. Significantly, the Court also determined that school officials have an independent constitutional duty to protect school children from known or reasonably foreseeable harm arising by virtue of state compulsory attendance laws. App. A-13. Apparently placing these "duties" together, the court held:

> In summary, we conclude that public school officials have a duty to police the misconduct of their subordinates and to protect school children from hazards of which school officials know or should know.
>
> * * * *
>
> School superintendents and principals have a duty to police the halls of our public schools to ensure that schoolchildren, who are obliged to attend, have an opportunity to learn and study in a school environment free from sexual molestation and harassment.

App. A-21,25.

Although Respondents recognize that the analysis in *Jane Doe "A"*, *supra*, has been followed in a variety of cases, the Fifth Circuit is the first court to cast it in the form of an affirmative constitutional duty. Moreover, no other circuit court has ever held that there is an affirmative constitutional duty to protect schoolchildren from risks of harm or to provide them with a safe school environment.[9] The Fifth

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[9] Based on prior argument, Petitioners anticipate that Respondent will take the position, in opposition to this Petition, that acceptance of the *Jane Doe "A"* analysis obviates the necessity

Circuit's decision creates a conflict among the circuits with regard to the existence or nonexistence of an affirmative duty to protect on the part of public school officials. Thus far, the Third, Seventh, and Tenth Circuits have expressly rejected the position adopted by the Fifth Circuit. *See Maldonado* v. *Josey*, 975 F.2d 727 (10th Cir. 1992); *D.R. by L.R.* v. *Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364 (3rd Cir. 1992) (en banc), *petition for cert. filed*, No. 92-816 (U.S. Nov. 9, 1992); *J.O.* v. *Alton Community Unit Sch. 11*, 909 F.2d 267 (7th Cir. 1990).[10]

The dispute among the circuits evolves from this Court's affirmative duty analysis in *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189 (1989). In *DeShaney*, this Court declined to impose an affirmative duty of care and protection upon state officials absent the existence of a "special relationship." *Id.* According to *DeShaney*, a special relationship arises only "when the State by the affirmative exercise of its power so restrains an individual's

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of reviewing the affirmative duty to protect, since either may apparently lead to a finding of liability against Petitioners. Regardless of whether the Fifth Circuit has correctly applied *Jane Doe "A"*, the existence of an affirmative duty to protect is something that Petitioners will have to reckon with at trial, and its significance to all school officials cannot be overstated.

[10] A number of district courts have, likewise, rejected the Fifth Circuit's position. *See Dorothy J.* v. *Little Rock Sch. Dist.*, 794 F.Supp. 1405 (E.D. Ark. 1992); *Elliott* v. *New Miami Bd. of Educ.*, 799 F.Supp. 818 (S.D. Ohio 1992); *Russell by Russell* v. *Fannin County Sch. Dist.*, 784 F. Supp. 1576 (N.D. Ga. 1992); *Doe* v. *Douglas County Sch. Dist. RE-1*, 770 F.Supp. 591 (D. Colo. 1991). *But see Pagano by Pagano* v. *Massapequa Public Schs.*, 714 F.Supp. 641 (E.D.N.Y. 1989); *Sowers* v. *Bradford Area Sch. Dist.*, 694 F.Supp. 125 (W.D. Pa. 1988), *aff'd*, 869 F.2d 591 (3rd Cir. 1989), *cert. granted and vacated*, 490 U.S. 1002 (1989); *cf. Waechter* v. *Sch. Dist. No. 14-030*, 773 F.Supp. 1005 (W.D. Mich. 1991) (custodial relationship found to exist between handicapped student and teacher where teacher was aware of student's physical limitations and undertook to supervise the student's activities during recess).

liberty that it renders him unable to care for himself." *Id.* at 200. Thus, "[t]he affirmative duty to protect arises not from the state's knowledge of the individual's predicament or from its expression of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."[11] *Id.*

Four circuits have been asked to extend the reasoning from *DeShaney* to include schoolchildren among those categories of individuals who enjoy a "special relationship" with the state. In each case, the circuit courts have been asked to find that a state's compulsory attendance laws and/or the doctrine of *in loco parentis* effectively place children in state "custody" during school hours. *See D.R. by L.R.*, 972 F.2d at 1370. The Third, Seventh, and Tenth Circuits have each declined to adopt this view. As the Third Circuit explained in *J.O.* v. *Alton Community Unit School District 11*,

> [i]t cannot be suggested that compulsory attendance makes a child unable to care for basic human needs. The parents still retain primary responsibility for feeding, clothing, sheltering, and caring for the child. By mandating school attendance . . . the state . . . has not assumed responsibility for their entire

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[11] This Court has specifically recognized only two categories of individuals who enjoy a "special relationship" with the State giving rise to such an affirmative duty: (1) incarcerated prisoners; and, (2) involuntarily committed mental patients. *See Youngberg* v. *Romeo*, 457 U.S. 307 (1982); *Estelle* v. *Gamble*, 429 U.S. 97 (1976). The *DeShaney* opinion acknowledges, however, that this list is not exhaustive: "Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." *DeShaney*, 489 U.S. at 201 n. 9. Clearly, compulsory attendance in the public schools is not analogous to incarceration, institutionalization *or* placement in a foster home.

> personal lives; these children and their parents retain substantial freedom to act.

909 F.2d at 272.

Although the Fifth Circuit refused to equate "a school yard to a prison," the court, nevertheless, concluded that schoolchildren are in the "functional custody" of school officials, thereby undermining the "special relationship" required by *DeShaney*:

> Separated from his or her parents (guardians), the child's safety and well-being are entrusted to school officials. Parents, guardians, and the children themselves have little choice but to rely on the school officials for some measure of protection and security while in school and can reasonably expect that the state will provide a safe school environment.

App. A-21.

Even if this Court does not see fit to grant review on the basis of the unqualified constitutional right to be free from sexual molestation articulated by the Fifth Circuit, it should nevertheless grant review based on the affirmative duty to protect announced by the circuit court. The Fifth Circuit's conclusion that school officials have an affirmative duty to protect schoolchildren and to provide them with a safe school environment is in conflict with the opinions of this Court and other circuits. Standing alone, such a duty opens up a veritable "Pandora's box" of tort liability for school officials under the due process clause. Coupled with an unqualified right on the part of students to be free from sexual molestation, it will render public school officials the insurors against and policeman of the private sex lives of teachers and students alike.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted and the case set for plenary review.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE FIFTH CIRCUIT

NO. 90-8431

JANE DOE,

Plaintiff-Appellee,

VERSUS

TAYLOR INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants,

AND

MIKE CAPLINGER AND EDDY LANKFORD

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Before GOLDBERG, HIGGINBOTHAM, and DAVIS, Circuit Judges. GOLDBERG, Circuit Judge:

You would think it obvious that sexual molestation, when visited upon one of our schoolchildren by her public schoolteacher, would undoubtedly violate her constitutional right to be free from intrusions into bodily integrity. You would also think it indisputable that a school superintendent and a school principal, once aware that such reprehensible conduct was taking place on their campus, would have not only a moral duty, but also a legal duty, to stop it — that the Constitution would not tolerate their looking the other way or taking only meager measures to protect a 14 year-old

schoolgirl from being sexually abused by one of their subordinates. Yet we are being asked to conclude, quite to the contrary, that what we deem to be patently obvious, was not so obvious to these school officials, when, in 1986-87, they learned that plaintiff Jane Doe,[1] then only a freshman at Taylor High School, was being sexually molested by her biology teacher.

We hold that Jane Doe had a firmly established constitutional right under the due process and equal protection clauses of the Fourteenth Amendment to be free from sexual molestation by a state-employed schoolteacher, that the superintendent and principal had an affirmative, constitutionally-based duty to protect her from such an intrusion into her bodily integrity, and that a genuine dispute of material fact exists as to whether the superintendent and principal acted with deliberate indifference toward Jane Doe's firmly established constitutional rights. We therefore remand this case to the district court for trial.

I. FACTS[2]

Lynn Stroud, a teacher and coach for almost twenty years, was employed by the Taylor Independent School District from 1981 until 1987. It was no secret within the school community that Coach Stroud had developed romantic

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[1] That is not her real name, of course, but she is so named in order to protect her identity.

[2] Because this case is on appeal from the denial of a motion for summary judgment, our review of the record is plenary. We are constrained to review the facts in the light most favorable to the nonmoving party in the court below, here, Jane Doe. *See International Shortstop, Inc.* v. *Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991), *cert. denied*, 112 S.Ct. . . . . (1992). Our recitation of the facts, therefore, is predictably slanted in her favor. Any disputes of fact must, of course, be resolved in Jane Doe's favor in determining whether the appellants are entitled to summary judgment. *See id.*

affections for a number of young female students over the course of his tenure at Taylor High. He made little effort to conceal his fancy for his female students, writing explicit love notes to them, letting them drive his truck, exhibiting explicit favoritism in class toward them, and physically touching them in a manner not becoming a schoolteacher. As early as 1985, complaints about Coach Stroud's behavior reached the offices of the principal and superintendent through various channels.

Enter Jane Doe, a freshman at Taylor High School in the 1986-87 academic year. Coach Stroud became enamored with her to the point of obsession. He began his seduction of her by writing suggestive comments on test papers. He would give her high grades without requiring that she do any work at all. He would take her and other female students out to lunch during the school day and buy them alcoholic beverages — something he did quite often for his female students. Not surprisingly, all of this flattered Jane Doe, and she developed a "crush" on Coach Stroud.

By late fall, Stroud was touching and kissing Jane Doe. It began with a kiss on her cheek as she was leaving the school field house one day. Eventually, he began taking her into the laboratory room adjacent to the classroom and to the field house where he would kiss and touch her. The kissing and touching escalated to heavy petting and undressing when, in January 1987, Stroud took Jane Doe to a rock concert. There, Stroud bought her an alcoholic beverage, took her back to the field house, and began caressing her in the most intimate of ways. He suggested intercourse, but she refused.

On Valentine's Day, Stroud gave Jane Doe a Valentine which read: "To my most favorite, prettiest, sweetest, nicest sweetheart in the world! Please don't change cause I need you. I'm in love with you. Forever — for real — I love you." A friend and classmate of Jane Doe's, Brittani B., found the

Valentine in Doe's purse and took it to the principal, defendant-appellant Eddy Lankford. Brittani told Principal Lankford that she suspected that Stroud was sexually involved with Jane Doe. Principal Lankford acknowledged that he was aware of rumors concerning Doe and Stroud but indicated that Stroud just had a way of flirting with the girls. In response to the Valentine, Principal Lankford transferred *Brittani* (not Jane Doe) out of Stroud's class, but did not investigate the matter further.

After a Valentine's Day dance, Jane Doe spent the night at Stroud's home; Doe had befriended Stroud's daughter, and Stroud had invited Doe to spend the night. While Doe was there, Stroud suggested to her that they have intercourse. Once again, she refused. She spent several nights at the Stroud home over the course of the next two months. Each time, Stroud would tell her that it would be "okay" for them to have sexual intercourse, and each time she would say no.

One week after the Valentine's Day dance, the superintendent of Taylor Independent School District, defendant-appellant Mike Caplinger, learned from another school official that Stroud was behaving "unprofessionally" with Jane Doe at a school basketball game. Superintendent Caplinger, Principal Lankford, and the athletic director spoke with Stroud about the matter. Troubled by allegations of sexual misconduct on the part of Stroud, the athletic director had already taken it upon himself to speak with Stroud on previous occasions, and so informed Principal Lankford. According to Principal Lankford, Superintendent Caplinger was informed of the several reports concerning Stroud. Nevertheless, Stroud remained in the employ of Taylor High.

By March or April, 1987, Stroud's persistence in seducing Jane Doe finally proved fruitful; he and Jane Doe had sexual intercourse. Doe was fifteen years old at the time, and

Stroud was her first sexual partner. As Jane Doe deposed, she "gave into" Stroud because she was "just tired of the pressure," sensing that Stroud was getting mad at her for not having sex with him; she was afraid of losing their friendship altogether.

Over the course of the next several months, Stroud and Doe had repeated sexual contact at different locations, both on and off the school grounds. At least twice, they engaged in oral sex. Their romantic relationship (although perhaps not the extent of it) was common knowledge within the Taylor High community, not only among students, but also among parents, faculty, and the two athletic directors. Jane Doe was reluctant to refuse Stroud's sexual advances out of fear that he would alienate her completely.

In June 1987, Stroud took Doe and some other girls to a festival where, once again, he provided them with alcoholic beverages. One girl became intoxicated. Stroud began dancing with Doe, angering Stroud's wife. Stroud took Doe out to a field, had sexual intercourse with her, took her (along with his daughter and the intoxicated girl) back to his home, and had sexual intercourse with Doe again later that night. Two concerned parents witnessed Stroud's behavior at the festival and reported the incident to Superintendent Caplinger. They also informed Superintendent Caplinger that Stroud exhibited favoritism toward female students in class. Superintendent Caplinger did not contact Jane Doe's parents to discuss the episode with them.[3]

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[3] Superintendent Caplinger allegedly telephoned the parents of one of the girls who, according to the report by the two concerned parents, was supposedly at the festival. Because the parents of the girl told him that their daughter was not at the festival, Superintendent Caplinger summarily dismissed the entire report without investigating the episode further.

If by then it was not plain to Superintendent Caplinger and Principal Lankford that something at Taylor High was terribly wrong, on July 15, 1987 the sirens should have sounded. Doe's parents discovered photographs of Stroud among Doe's possessions with such handwritten inscriptions by Stroud as: "Please don't ever change and don't ever leave me. I want to be this close always — I love you — Coach Lynn Stroud." Doe's parents immediately brought the signed photographs to the attention of Superintendent Caplinger. Superintendent Caplinger confirmed to Doe's parents that he was aware of rumors concerning Coach Stroud; indeed, several concerned parents had contacted the principal's office to request that their children not be assigned to Stroud's biology class. Superintendent Caplinger told Jane Doe's parents that he would convene a meeting of all parties involved. Although no such meeting took place, Caplinger met with Jane Doe. He showed her the photographs and inquired as to the nature of her relationship with Stroud. Doe suggested that the note on the photograph was just a "friendly gesture" and explicitly denied any sexual relations with Stroud. Principal Lankford met with Stroud to discuss the matter. Stroud denied any sexual involvement with Doe. With that, Principal Lankford warned Stroud that he would be fired "if something was going on." Superintendent Caplinger and Principal Lankford were apparently satisfied that nothing was going on, based solely on the adamant denials of the alleged culprit (Stroud) and the 15 year-old victim (Jane Doe).

Although Jane Doe was able to stay away from Stroud for the remainder of the summer, when classes resumed in the fall, Stroud's sexual advances towards Jane Doe resumed as well, and, once again, Stroud was having sexual intercourse with her. The sexual contact continued through the fall of Jane Doe's sophomore year, until October 5, 1987, when

Jane Doe's mother found more love letters from Stroud. Suspicious about their daughter's relationship with Stroud, they consulted with their family lawyer who agreed to discuss the matter with Jane Doe. Meeting with Jane Doe for the first time, the attorney learned the truth about her sexual involvement with Stroud. Jane Doe explained that she had kept the matter a secret all this time because she feared the repercussions of disclosure. The attorney reported this information to Superintendent Caplinger at once. Coincidentally, on that same day, another schoolgirl contacted Caplinger to report that she too had been victimized by Stroud; he had made unwelcome sexual advances towards her, as well. Stroud was suspended without pay, later resigned, and pled guilty to criminal charges in connection with this incident.

II. PROCEDURAL HISTORY

Jane Doe brought this civil rights lawsuit against Stroud, the school district, Superintendent Caplinger, and Principal Lankford alleging a variety of state law claims, a due process claim, and an equal protection claim. Following the denial of their motion for summary judgment on qualified immunity grounds, Superintendent Caplinger and Principal Lankford appealed. *See Mitchell* v. *Forsyth*, 105 S. Ct. 2806, 2817 (1985) (denial of qualified immunity is an immediately appealable order). In their motion for summary judgment, and in their briefs on appeal to this court, the appellants (Superintendent Caplinger and Principal Lankford) have contended that they are entitled to qualified immunity on the constitutional claims because Jane Doe was not deprived of any clearly established constitutional right when she was sexually molested by Coach Stroud, that they had no constitutional duty to protect her from Coach Stroud, and that their conduct in connection with the allegations of sexual misconduct was objectively reasonable.

There is no dispute that the burden of establishing an entitlement to qualified immunity is on Superintendent Caplinger and Principal Lankford, the officials seeking to invoke it. *Stoneking* v. *Bradford Area School Dist.*, 882 F.2d 720, 726 (3d Cir.) ("*Stoneking II*"), *cert. denied*, 110 S. Ct. 840 (1990). They "must show that their conduct did 'not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Id.* (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). Thus, Superintendent Caplinger and Principal Lankford must demonstrate that "reasonable officials in [their] position at the relevant time could have believed, in light of clearly established law, that their conduct comported with established legal standards." *See id.*; *accord Jefferson* v. *Ysleta Indep. School Dist.*, 817 F.2d 303, 305 (5th Cir. 1987).

III. DUE PROCESS

A. Clearly Established Constitutional Right

The alleged constitutional violation in this case is the failure of Superintendent Caplinger and Principal Lankford to protect Jane Doe from the sexual molestation visited upon her by Coach Stroud, a subordinate of Caplinger and Lankford's. The inquiry can be divided into two discrete questions: first, whether sexual molestation of a schoolchild rises to the level of a constitutional deprivation, and second, whether top-level school officials owe the students entrusted to their care some affirmative duty of protection from such an assault on the students' constitutional rights.

1. *Sexual Molestation*

We begin with the familiar notion that the Constitution forbids a state actor from arbitrarily yet intentionally inflicting physical injury upon a person. A state actor cannot simply beat someone senseless absent some justification.

Nor can a state actor use means which "shock the conscience" in the name of the public good. *See Rochin* v. *California*, 72 S. Ct. 205 (1952) (police could not pump a suspect's stomach in order to retrieve evidence). Such conduct and methods plainly implicate the substantive component of the Due Process Clause of the Fifth and Fourteenth Amendments because they intrude upon an individual's liberty interest to be free from bodily abuse. *See Jefferson*, 817 F.2d at 305.

Even when constitutional liberty interests are implicated, not all bodily injuries caused by state actors give rise to a *constitutional* tort, for it is well settled that mere negligence on the part of a state actor does not constitute a deprivation of due process under the Constitution. *Daniels* v. *Williams*, 106 S. Ct. 662, 665 (1986). An intentional tort does work a deprivation, as does tortious conduct exceeding mere negligence but not quite rising to the level of intentional, *e.g.*, deliberate (or conscious) indifference, recklessness or gross negligence. *See Sivard* v. *Pulaski County*, 959 F.2d 662, 669 (7th Cir. 1992) ("A § 1983 claim must be based on deliberate indifference, not on mere inadvertence."); *Lopez* v. *Houston Indep. School Dist.*, 817 F.2d 351, 355 (5th Cir. 1987) (liability only where state actors are "grossly negligent or deliberately indifferent"); *see generally Temkin* v. *Frederick County Comm'rs*, 945 F.2d 716, 722-23 (4th Cir. 1991) (collecting cases from around the circuits), *cert. denied*, 112 S. Ct. 1172 (1992).

In the context of torts committed against children in the school environment, the Fifth Circuit in *Jefferson* held that a public school teacher violated the constitutional rights of a schoolchild by lashing a child to a chair for a protracted period of time, without any justification whatsoever. *Id.* The court grounded its holding on the schoolchild's constitutional liberty interest to be free from bodily restraint. *Id.* The

Fifth Circuit has also held that the infliction of "corporal punishment in public schools is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." *Fee* v. *Herndon*, 900 F.2d 804, 808 (5th Cir.) (quoting *Woodard* v. *Los Fresnos Indep. School Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984)), *cert. denied*, 111 S.279 (1990); *see generally Ingraham* v. *Wright*, 97 S. Ct. 1401, 1413 (1977) ("[W]e find that corporal punishment in public schools implicates a constitutionally protected liberty interest. . . ."). It is quite clear from our circuit's jurisprudence that the Constitution forbids schoolteachers from physically assaulting our schoolchildren absent some legitimate punitive or disciplinary purpose. *Jefferson*, 817 F.2d at 305.

From these basic principles it necessarily follows that *the Constitution* proscribes public school teachers from sexually molesting our schoolchildren. We concede that there is no case in our circuit directly standing for that proposition. No matter, for "it is not necessary to point to a precedent which is factually on all-fours with the case at bar." *Id.* As Judge Posner has explained:

> The easiest cases don't even arise. There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances.

K.H. Through Murphy v. *Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

If it is unconstitutional for a public school teacher to tie a child to a chair, *e.g.*, *Jefferson*, 817 F.2d at 305 or to arbitrarily paddle a student on his behind, *see Woodard*, 732 F.2d 1246, and if a state actor may not intentionally assault a

person without justification, then surely it is unconstitutional for a public school teacher to sexually molest a schoolchild. We take no great leap in coming to this conclusion. The Third Circuit has also recognized that a schoolchild has a constitutional liberty interest to be free from sexual molestation:

> A teacher's sexual molestation of a student is an intrusion of the schoolchild's bodily integrity not substantively different for constitutional purposes from corporal punishment by teachers. Reasonable officials would have understood the "contours" of a student's right to bodily integrity, under the Due Process Clause, to encompass a student's right to be free from sexual assaults by his or her teachers.
>
> Since a teacher's sexual molestation of a student could not possibly be deemed an acceptable practice, as some view teacher-inflicted corporal punishment, a student's right to be free from such molestation may be viewed as clearly established even before *Ingraham [*v. *Wright* was decided in 1977].

Stoneking II, 882 F.2d at 727 (citations omitted). The Tenth Circuit shares that view. *See D.T. by M.T.* v. *Indep. School Dist. No. 16*, 894 F.2d 1176, 1187 (10th Cir.) (observing that "act of sexual molestation" is a "constitutional tort" but finding school district not liable because schoolteacher was not acting under color of state law when he molested the children during the summer months), *cert. denied*, 111 S. Ct. 213 (1990).

The Third Circuit has also recognized, in the analogous context of institutionalized, mentally handicapped persons, that the "right to freedom from bodily restraint and the right to safe conditions" includes the right not to be sexually molested, and that such a right is "encompassed within the 'liberty' substantively protected by the fourteenth amendment due process clause." *Shaw by Strain* v. *Strackhouse*, 920 F.2d 1135, 1142 (3d Cir. 1990). Other circuit courts,

confronted with instances of sexual molestation in a variety of contexts, have suggested, some quite explicitly, that such misconduct amounts to a deprivation of due process. *See Yvonne L.* v. *New Mexico Dept. of Human Services*, 959 F.2d 883, 893 (10th Cir. 1992) (holding that children in custody of state have constitutional right to be reasonably safe from harm such as sexual molestation); *Doe* v. New York City Dept. of Soc. Services, 649 F.2d 134, 145-46 (2d Cir. 1981) (holding that a state foster care agency has an affirmative duty to protect a child from sexual abuse inflicted by foster parents); *see also Simescu* v. *Emmet County Dept. of Social Services*, 942 F.2d 372 (6th Cir. 1991) (child sexually molested by a man working with a social services agency; agency was deemed a private actor and, thus, not liable under § 1983 because it did not act "under color of state law"); *P.C.* v. *McLaughlin*, 913 F.2d 1033, 1045 (2d Cir. 1990) (staff person sexually assaulted mildly retarded resident at state institution; officials not liable because no evidence of deliberate indifference); *Jane Doe "A"* v. *Special School Dist. of St. Louis County*, 901 F.2d 642, 646-47 (8th Cir. 1990) (bus driver sexually assaulted handicapped students; school district and its officials not liable because no evidence of deliberate indifference).

We think it incontrovertible that bodily integrity is necessarily compromised when a state actor sexually assaults a schoolchild (or anyone for that matter) and that such misconduct implicates due process. Obviously, there is never any justification for sexually molesting a schoolchild, and thus, no state interest, analogous to the punitive and disciplinary objectives attendant to corporal punishment, which

might support it.[4] Although we explicitly express this opinion for the first time in this circuit,[5] we harbor no doubt — nor should any school teacher or official — that such a conclusion follows from the well-established jurisprudence governing tortious conduct committed by state actors and the jurisprudence delineating the liberty interests enjoyed by our schoolchildren.

2. *School Officials' Duty of Care*

Having concluded that Coach Stroud's sexual molestation of Jane Doe violated her firmly established constitutional right to substantive due process, we next consider whether Superintendent Caplinger and Principal Lankford violated Jane Doe's constitutional rights by failing to protect her from Coach Stroud's transgressions. In essence we ask whether school officials have some affirmative duty to protect schoolchildren from tortious conduct by others. This inquiry can be explored from two angles: either from the perspective that school officials are responsible for properly monitoring and disciplining subordinates (such as schoolteachers) over whom they exercise supervisory authority; or from the viewpoint that school officials have a constitutional duty to protect schoolchildren from known or reasonably foreseeable harms occurring during or in connection with

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[4] Thus, those cases in this circuit which have held that the infliction of excessive corporal punishment does not violate due process are inapposite. *E.g., Fee* v. *Herndon*, 900 F.2d 804 (5th Cir.), *cert. denied*, 111 S. Ct. 279 (1990), and cases cited therein.

[5] In *Spann for Spann* v. *Tyler Indep. School Dist.*, 876 F.2d 437, 438 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 847 (1990), we assumed *arguendo* that a schoolchild "had a constitutional right to be protected from" sexual molestation, but did not make an explicit proclamation on the subject.

school activities.[6] From either standpoint, we find such a duty.

Supervisory liability can be the basis for Jane Doe's claim against Superintendent Caplinger and Principal Lankford. However, "as supervisory officials, [Superintendent Caplinger and Principal Lankford] may not be held liable under § 1983 on a respondeat superior theory for actions of" Coach Stroud. *Lopez* v. *Houston Indep. School Dist.*, 817 F.2d 351, 355 (5th Cir. 1987). Only their direct acts or omissions can form the basis for liability. *Id.* Causation aside, they are only liable if they failed to fulfill the duty they owed to Jane Doe. Jane Doe must prove:

(1) that the school officials "[r]eceived notice of a pattern of unconstitutional acts committed by subordinates;"

(2) that the school officials "[d]emonstrated deliberate indifference to or tacit authorization of the offensive acts;"

(3) that the school officials "[f]ailed to take sufficient remedial action; and

(4) [t]hat such failure proximately caused injury to [Jane Doe].

Jane Doe "A" v. *Special School Dist. of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990). When school officials are on "notice of a pattern of unconstitutional acts committed by subordinates, *id.*, the Constitution will not tolerate a practice of deliberate or conscious indifference to the potentiality of

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[6] As we shall elaborate infra, this duty arises by virtue of state law which compels public school attendance. *See* Tex. Educ. Code Ann. § 21.032 (Vernon 1987) ("Compulsory Attendance"); *Lopez* v. *Houston Indep. School Dist.*, 817 F.2d 351, 356 (5th Cir. 1987) (holding that bus driver could be held liable for failing to break up a fight between school children because he was "entrusted with the care of students attending school under Texas' compulsory education statute.").

harm that is likely to follow. Just as a police chief, sheriff, or warden can, under certain circumstances, be held liable for the misconduct of his officers, deputies, or jailers who violate the rights of those persons with whom they come into contact,[7] so too can a superintendent or principal be held liable when, by his own actions or inactions, he consciously allows a schoolteacher to violate the bodily integrity of a schoolchild. *See Stoneking II*, 882 F.2d at 724-25 (school official can be liable if he "maintains a practice, custom, or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers, in concealing complaints of abuse, and in discouraging students' complaints about such conduct."); *Jefferson*, 817 F.2d at 304-06 (holding that a principal was not entitled to qualified immunity as a matter of law where a teacher tied a second-grader to a chair for an entire day and the better part of another, and such an instructional technique was allegedly imposed by school policy); *cf. Lopez*, 817 F.2d at 355 (holding that supervisory school officials were not liable because there was

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[7] *See Thompkins* v. *Belt*, 828 F.2d 298, 304 (5th Cir. 1987) ("Supervisory liability exists even without overt personal participation in the offensive act if supervisory officials "implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.") (citations and quotations omitted); *accord Hardin* v. *Hayes*, 957 F.2d 845, 849 (11th Cir. 1992) ("A supervisor may be liable under section 1983 if ... the challenged actions are causally connected to a constitutional violation."); *Sample* v. *Diecks*, 885 F.2d 1099, 1117-18 (3d Cir. 1989) (outlining the basis for supervisory liability against prison officials); *see also City of Canton, Ohio* v. *Harris*, 109 S. Ct. 1197, 1205 (1989) (municipality can be held liable for the torts committed by its police officers where "the failure to train [the officers] amounts to deliberate indifference to the rights of persons with whom the police come into contact."); *cf. Brown* v. *Grabowski*, 922 F.2d 1097, 1120 n.16 (3d Cir. 1990) (distinguishing *Stoneking II* and *Sample* in finding no supervisory liability against police chief), *cert. denied*, 111 S. Ct. 2827 (1991).

no evidence of widespread abuse). In sum, school officials can find themselves liable for the malfeasance of their subordinates if they know or should be aware of the transgressions, yet consciously choose not to put an end to them, for such dereliction can only be viewed as implicit condonation of the subordinate's constitutional indiscretion. Of course, there must also be a causal link between the officials, delinquency and the ultimate harm that follows. *Jane Doe "A"*, 901 F.2d at 645; *cf. Collins* v. *City of Harker Heights, Texas,* 112 S. Ct. 1061, 1069 (1992) (explaining that "deliberate indifference" in training employees provides the necessary causal link to hold a municipality liable for the torts of its employees).

Alternatively, school officials can be held liable under § 1983 for the harms suffered by schoolchildren based on a breach of their duty to protect schoolchildren. Ten years ago, the Fifth Circuit addressed the special relationship between public school officials and the schoolchildren compelled to attend public schools. Observing that schoolchildren are "too young to be considered capable of mature restraint," the court explained that a public school

> assumes a duty to protect (the schoolchildren from dangers posed by anti-social activities — their own and those of other students — and to provide them with an environment in which education is possible.

Horton v. *Goose Creek Indep. School Dist.*, 690 F.2d 470, 480 (5th Cir. 1982) (emphasis added), *cert. denied*, 103 S. Ct. 3536 (1983). Although we chose not to ground this "duty to protect" on the doctrine of "*in loco parentis*," we expressed our view "that school officials have special duties with associated powers." *Id.* at 480-81 n.18. Five years later, we cited *Horton* with approval in a case holding that a bus driver could be held liable for failing to break up a fight between school children because he was "entrusted with the care of

students attending school under Texas' compulsory education statute." *See Lopez*, 817 F.2d at 356 (citing Tex. Educ. Code Ann. § 21.032 (Vernon 1987) ("Compulsory Attendance")). We explained that the bus driver's "failure to protect [the schoolchild] or to render emergency aid [would amount to an] abuse [of] state power, and support[ ] a § 1983 action if . . . it rose to the level of callous indifference and was a cause of injury." *Id.*[8]

The Supreme Court's recent decision in *DeShaney* v. *Winnebago County Dept. of Soc. Services*, 109 S. Ct. 998 (1989), addressed the contours of this "duty to protect," explaining that an

> affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, *or other similar restraint of personal liberty* — which is the "deprivation of liberty" triggering protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

DeShaney, 109 S. at 1006 (emphasis added). Our court has since expounded upon the principles of *DeShaney*, illuminating that

> [a] special relationship exists "when the State by an affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself." Although the Due Process Clause does not require a governmental body to assist the

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[8] We also intimated that the supervisory officials could be held liable if they failed to properly train the bus drivers in the face of evidence of a "pre-existing pattern of student fights on buses, constituting a widespread problem mandating an official response." *Lopez*, 817 F.2d at 354.

> public, *a duty to provide adequate protective services may arise out of "special relationships" created or assumed by the state with regard to particular individuals.*

Griffith v. *Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990) (emphasis added) (quoting *DeShaney*), *cert. denied*, 111 S. Ct. 712 (1991).

A special relationship between the state and a child arises in a variety of contexts: when a child is confined to a state mental health facility;[9] when a state social services agency removes a child from his natural home and places him under state supervision;[10] or when a child has been placed in foster care.[11] In these instances,[12] the state has, to varying degrees, assumed an obligation to protect the child, in much the same way that a capable parent would. A child generally depends on his parents to guard against the dangers of his surroundings. This is a fundamental notion of our organized society and at the heart of what many would dub "family values." By removing the child from his home, even when the child's

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[9] *E.g.*, *Youngberg* v. *Romeo*, 102 S. Ct. 2452, 2460 (1982).

[10] *E.g.*, *Griffith*, 899 F.2d at 1439.

[11] *E.g.*, *Yvonne L.*, 959 F.2d at 890; *K.H. through Morgan*, 914 F.2d at 851; *Taylor by and through Walker* v. *Ledbetter*, 818 F.2d 791, 795-98 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337 (1989); *Doe* v. *New York City Dept. of Soc. Services*, 649 F.2d 134, 141 (2d Cir. 1981). The Supreme Court in *DeShaney* explicitly declined to address the nature of the duty that arises in the foster care context. 109 S. Ct. at 1006 n.9.

[12] A special relationship also exists in the prison and jail context because prisoners and detainees, as a consequence of the restraints imposed upon them, are rendered incapable of providing for and protecting themselves. Prison officials, therefore, have an affirmative duty to provide necessary services and to protect prisoner and detainees from injuries. *See Estelle* v. *Gamble*, 97 S. Ct. 285, 291-92 (1976) (convicted prisoners); *Bell* v. *Wolfish*, 99 S. Ct. 1861, 1871 (1979) (pretrial detainees); *see also Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 244-45 (1983) (arrestees).

best interests lie in such action, the state thereby obligates itself to shoulder the burden of protecting the child from foreseeable trauma. *See K.H. through Murphy,* 914 F.2d at 849 ("Once the state assumes custody of a person, it owes him a rudimentary duty of safekeeping no matter how perilous his circumstances when he was free."). For if a state opts to uproot a child from his home environment precisely because his parents are not fit to provide the requisite care and protection, *e.g., K.H. through Murphy,* 914 F.2d at 848, it would be strange, indeed, to countenance the very same neglect simply because it is administered at the hands of the state. *Id.* at 849.

Inasmuch as a state acquires a duty to protect an individual when it "render[s] that individual unable to act for himself," Shaw, 920 F.2d at 1144, so too does the state acquire a duty to protect a child when it renders the guardian of that child powerless to act on the child's behalf. So, when the state has in some significant way separated the child from the persons otherwise responsible for taking precautions to shield the child from the social milieu, the state assumes a corresponding duty to provide that protection, for a child is ordinarily incapable of fending for himself. And if state agents, responsible for the well-being of the child, know of an asserted danger to such a child yet consciously fail to safeguard the child from that danger, they will be liable for those injuries sustained by the child provided that the injuries are affirmatively linked to the state agents' nonfeasance. *See Yvonne L.,* 959 F.2d at 890 (defendants liable if they "knew of the asserted danger to [the children] or failed to exercise professional judgment with respect thereto" and there is "an affirmative link to the injuries . . . .").

This basis for liability, as this circuit has already intimated in *Horton* and *Lopez,* applies to public school officials, because by compelling a child to attend public school, the

state cultivates a special relationship with that child and thus owes him an affirmative duty of protection.[13] Although

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[13] *See Horton,* 690 F.2d at 480; Lopez, 817 F.2d at 356; *accord D.R. by L.R* v. *Middle Bucks Area Vocational Technical School,* . . . F.2d . . ., 1992 WL 191115 at *14 (3d Cir. Aug. 11, 1992) (en banc) (Sloviter, C.J. joined by Mansmann, Scirica, and Nygaard, JJ., dissenting) ("I would hold that the state compulsion that students attend school, the status of most students as minors whose judgment is not fully mature, the discretions extended by the state to schools to control student behavior, and the pervasive control exercised by the schools over their students during the period of time they are in school, combine to create the type of special relationship which imposes a constitutional duty on the schools to protect the liberty interests of students while they are in the state's functional custody."); *id.* at *22 (Becker, J., dissenting) (finding a duty to protect on the particular facts of the case); *Stoneking* v. *Bradford Area School Dist.,* 856 F.2d 594, 601 (3d Cir. 1988) ("Because students are placed in school at the command of the state and are not free to decline to attend, students are in what may be viewed as functional custody of the school authorities . . . ."), *vacated,* 109 S. Ct. 1333 (1989); *Pagano by Pagano Massapequa Public School,* 714 F. Supp. 641, 643 (E.D.N.Y. 1989) (holding that elementary school students, who were required by law to attend school, were entitled to some affirmative protection form abuse by other students during the school day"); *see also Stoneking II,* 882 F.2d at 723 ("Arguably, our earlier discussion noting that students are in what may be viewed as functional custody of the school authorities during their presence at school because they are required to attend under Pennsylvania law . . . . is not inconsistent with the *DeShaney* opinion."). *But see D.R. by L.R.,* 1992 WL 191115 at *8 (en banc) ("[T]he school defendants, authority over D.R. during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in *DeShaney,* particularly where their channels for outside communication were not totally closed."); *J.O.* v. *Alton Community Unit School Dist. 11,* 909 F.2d 267, 272-73 (7th Cir. 1990) (concluding that school officials have no duty to protect schoolchild from sexual abuse by teacher, reasoning that "compulsory school attendance [does not] make[ ] a child unable to care for basic human needs. Schoolchildren are not like mental patients and prisoners such that the state has an affirmative duty to protect them."); *Dorothy J.* v. *Little Rock School District,* . . . F. Supp. . . ., 1992 WL 113728 (E.D. Ark. May 28, 1992) (same).

we too would not equate "a school yard to a prison," *J.O.* v. *Alton Community Unit School Dist. 11,* 909 F.2d 267, 272 (7th Cir. 1990), we nevertheless find a schoolchild to be in the "functional custody" of school officials. *See Stoneking II,* 882 F.2d at 723; *Stoneking* v. *Bradford Area School Dist.,* 856 F.2d 594, 601 (3d Cir. 1988), *vacated,* 109 S. Ct. 1333 (1989). Separated from his or her parents (guardians), the child's safety and well-being are entrusted to school officials. *Contra D.R. by L.R* v. *Middle Bucks Area Vocational Technical School,* . . . F.2d . . ., 1992 WL 191115 at *8 (3d Cir. Aug. 11, 1992) (en banc); *J.O.* v. *Alton,* 909 F.2d at 272; *see supra* note 13. Parents, guardians, and the children themselves have little choice but to rely on the school officials for some measure of protection and security while in school and can reasonably expect that the state will provide a safe school environment. To hold otherwise would call into question the constitutionality of compulsory attendance statutes, for we would be permitting a state to compel parents to surrender their offspring to the tender mercies of school officials without exacting some assurance from the state that school officials will undertake the role of guardian that parents might not otherwise relinquish, even temporarily.

In summary, we conclude that public school officials have a duty to police the misconduct of their subordinates and to protect schoolchildren from hazards of which the school officials know or should know. Their deliberate indifference to these duties can form the basis of liability against them. This does not mean that school officials are liable in the ordinary course for injuries to students inflicted by fellow students.[14] We speak here of constitutional wrongs, not tort

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[14] The precise contours of a school official's duty, as it pertains to injuries inflicted by someone other than a school teacher (or other subordinate), is not before us. *Compare Lopez,* 817 F.2d at 356 (5th Cir.) (finding such a duty) *with D.R by L.R,* 1992 WL 191115 at *8 (3d Cir.) (finding no such duty).

principles. The four elements of *Jane Doe "A"*, 901 F.2d at 645, detailed above, must be met. These elements screen the lesser invasions from those of constitutional dimension.

B. Objective Reasonableness of the School Officials' Conduct

All that remains, having concluded that no reasonable school official would have believed that he could act with deliberate indifference towards instances of sexual molestation by a schoolteacher, is to determine whether there is enough evidence in the record from which a jury could conclude that Superintendent Caplinger and Principal Lankford were deliberately indifferent to Jane Doe's clearly established right not to be molested by Coach Stroud. "The deliberate indifference standard requires a showing, in cases alleging that a state actor failed to provide adequate protection, that the state actor was recklessly indifferent, grossly negligent, or deliberately or intentionally indifferent." *Shaw*, 920 F.2d at 1145. Given all of the information that Superintendent Caplinger and Principal Lankford had, we conclude that a jury could find that their response to Jane Doe's predicament was woefully inadequate, thus precluding summary judgment on the issue of qualified immunity.[15]

Appellants make much of the fact that they confronted Jane Doe and Coach Stroud about the allegations and that both of them denied any sexual involvement. According to appellants, that establishes that they were not deliberately indifferent. Hardly, for a jury could conclude that a reasonable school official, faced with repeated allegations of sexual misconduct from a host of sources, would not summarily

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[15] That the record would also allow a conclusion to the contrary is beside the point at the summary judgment stage for the facts must be considered in the light most favorable to Jane Doe, the non-moving party.

dismiss the matter solely on the denials of the alleged perpetrator and the frightened, fifteen year old victim.[16] We need not catalog all of the evidence in the record establishing that Superintendent Caplinger and Principal Lankford were on notice; suffice it to say that several members of the faculty approached Principal Lankford about their suspicions and observations, and Superintendent Caplinger was aware of these reports and the rumors around campus that Stroud was getting too close to female students (Jane Doe in particular). Although some of the "rumors" concerning Stroud's misconduct, both with Doe and other students, were not detailed, certainly enough information made its way to the offices of the superintendent and principal concerning Stroud to alert a reasonable school official that something had gone constitutionally awry on their campus — or so a jury could conclude. The Valentine episode, for example, in which Brittani B. informed Lankford about the note and her suspicions concerning the illicit sexual involvement between Doe and Stroud, should have prompted a more profound response than simply transferring Brittani B. out of the class. Principal Lankford failed to document the allegations and did not pursue it with Coach Stroud.[17] A jury could conclude that such a response communicated that school officials were not taking allegations of sexual misconduct seriously. There is simply too much evidence in this record indicating that Superintendent Caplinger and Principal Lankford knew of a pattern of misconduct by Stroud to take this case away from

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[16] Although Jane Doe's denials "may be relevant at trial to her credibility or the causation issue, for qualified immunity purposes it is sufficient that there is adequate evidence that [the school officials] were on notice of complaints of sexual harassment of students by teachers and staff at the school." *Stoneking II*, 882 F.2d at 729.

[17] There is a factual dispute over whether Principal Lankford reported the matter to Superintendent Caplinger, a question for the jury to decide.

a jury. Furthermore, a jury could conclude that Superintendent Caplinger and Principal Lankford did little to help Jane Doe: They could have contacted Jane Doe's parents, separated Doe from Stroud, kept a more watchful eye on Stroud once the allegations intensified, and disciplined Stroud, if not terminated his employment, sooner than they did.

In fairness to these school officials, there is evidence in the record that in July 1987, when approached by Jane Doe's parents, they stepped up their efforts. But this case comes to us on summary judgment, and a jury could find that their *non*feasance up to then, and even after, was not merely negligent, but grossly negligent, reckless, or deliberately (consciously) indifferent; that Superintendent Caplinger's and Principal Lankford's toleration of Stroud's alleged misconduct for so long communicated their tacit condonation of his *mal*feasance.

III. EQUAL PROTECTION

The same analysis that militates in favor of sending this case to a jury on Doe's due process claim counsels in favor of sending her equal protection claim to the jury as well. We shall not elaborate at length.

Sexual harassment is a form of sexual discrimination proscribed by the equal protection clause. *Volk* v. *Coler*, 845 F.2d 1422, 1431 (7th Cir. 1988) (citing earlier cases). Although most of the cases on this subject arise in the context of harassment in the work place, there is no meaningful distinction between the work environment and school environment which would forbid such discrimination in the former context and tolerate it in the latter. Women need not endure sexual harassment by state actors under any circumstance, the school setting included. A reasonable school official in 1986 would have known that. *See Volk*, 845 F.2d at

1431 (citing cases); *cf. Meritor Savings Bank FSB* v. *Vinson*, 106 S.2399 (1986) (sexual harassment as a cause of action under Title VII).

Because there is evidence in the record from which a jury could conclude that Superintendent Caplinger and Principal Lankford knew that Stroud was harassing his female students, Caplinger and Stroud are not entitled to qualified immunity as a matter of law. Rumors were abound concerning Stroud's "favoritism" towards his female students, that he was flirtatious with them, and that he treated them differently than he treated his male students. His sexual advances may have been subtle, even flattering, in some instances (although obviously not that subtle with respect to Jane Doe), but there is evidence that some female students, including Jane Doe, felt awkward about rejecting Stroud's advances. True, Jane Doe told school officials that Stroud's advances were merely friendly gestures. But a jury could conclude (although it might not) that reasonable school officials, cognizant of the widespread allegations concerning Stroud's sexual advances towards female students, would not excuse Stroud's misconduct.

IV. CONCLUSION

School superintendents and principals have a duty to police the halls of our public schools to insure that schoolchildren, who are obliged to attend, have an opportunity to learn and study in a school environment free from sexual molestation and harassment. We therefore remand this case to the district court for trial so that a jury can decide whether Superintendent Caplinger and Principal Lankford should be granted an "excused absence" with respect to their response (or lack thereof) to Jane Doe's predicament.

AFFIRMED and REMANDED.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 90-8431

D.C. DOCKET NO. A 89 CA 271

JANE DOE,

Plaintiff-Appellee,

VERSUS

TAYLOR INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants,

AND

MIKE CAPLINGER AND EDDY LANKFORD

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Before GOLDBERG, HIGGINBOTHAM and DAVIS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed, and the cause is remanded to the District Court for trial so that a jury can decide whether Superintendent Caplinger and Principal

Lankford should be granted an "excused absence" with respect to their response to Jane Doe's predicament.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

October 2, 1992

ISSUED AS MANDATE:

APPENDIX C

C-1

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE	§	
	§	
VS.	§	
	§	CAUSE NO. A-89-CA-271
TAYLOR INDEPENDENT SCHOOL DISTRICT, ET AL	§	
	§	
	§	

MEMORANDUM OPINION

Regarding Defendants' Motion for Summary Judgment and *Defendants' Good Faith Qualified Immunity Defense*

Before the Court is the Court's June 8, 1990 Order regarding the defendants' May 1, 1990 Motion to Dismiss and Alternative Motion for Summary Judgment. On page 7 of the third full paragraph of the Court's June 8, 1990 Order, the Court stated that it would issue a detailed memorandum opinion on this matter in a separate document. The memorandum opinion mentioned in that paragraph is the subject of this document.

On June 8, 1990, the Court denied Defendants Lankford and Caplinger's Motion for Summary Judgment based on a good-faith, qualified immunity defense.

Defendants Lankford and Caplinger ("the defendants") have taken an interlocutory appeal of this issue, certified by the Court's Order of June 8, 1990.

The Court notes that Defendant Taylor Independent School District (TISD) is not entitled to a good-faith, qualified immunity defense because it was sued only in its official capacity. *Familias Unidas* v. *Brisco,* 619 F.2d 391, 403 (5th

Cir. 1980). Further, the Court notes that Mr. Stroud has filed for personal bankruptcy and that he has not joined in the Defendants' Motion for Summary Judgment. Thus, the Court's opinion below concerns only Defendants Lankford and Caplinger in their individual capacities. The Court will refer to Defendants Lankford and Caplinger as "the defendants." The Court will refer to Defendant Stroud as "Mr. Stroud."

I. STANDARD OF REVIEW

The Court may grant summary judgment under F.R.Civ.P. 56(c) only if (1) the record reveals no genuine issue as to any material fact, and (2) the proving party is entitled to judgment as a matter of law. *Celotex Corp.* v. *Catrett, 106 S.Ct. 2548, 2552-53 (1986). In deciding whether to grant summary judgment, the Court should review the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. Pharo* v. *Smith,* 621 F.2d 656, 664 (5th Cir. 1980). In this case, the plaintiff is the party opposing summary judgment; therefore, the Court will review the evidence in the light most favorable to the plaintiff.

II. STATEMENT OF FACT AS ALLEGED BY THE PLAINTIFF

Below are the facts presented in the light most favorable to the plaintiff, as drawn from affidavits and depositions submitted by the plaintiff as exhibits to the plaintiff's Response to the defendants' Motion for Summary Judgment.

Mr. Stroud, teacher and coach for almost 20 years, had been employed by Taylor ISD since 1981-82. Defendant Lankford became principal and immediate supervisor of Stroud, the offender, in the 1983-84 school year. Defendant

Caplinger became Superintendent of Taylor ISD in July of 1986.

A. Caplinger's & Lankford's Failure to Respond to Stroud's Prior Pattern of Conduct.

Beginning in at least 1984-85, the plaintiff can document both (1) Mr. Stroud's pattern of sexual harassment or "sexually oriented favoritism" toward freshman or 9th grade girls in his biology class and (2) the common knowledge of such conduct on the part of the Taylor High School community, including Defendants Lankford and Caplinger.

The first student about whom the plaintiff has clear evidence is Cherry Fugate, a 9th-grade freshman in the 1984-85 school year. Although Mr. Stroud had no responsibilities to the girls' athletic teams, he would "hang around" Cherry's volleyball and basketball games. He wrote Cherry notes and signed them, "Love You." He gave her gifts. He walked her to class. He called her at home.

Open teasing went on among students and other teachers concerning the relationship between Mr. Stroud and Cherry Fugate. The unusual nature of his attentions to Cherry was apparent to the Taylor High School community according to this victim, Cherry Fugate, and numerous other members of the Taylor High School community, including: Mr. Kuhl and Mr. Potts, both coaches at Taylor High School; Colleen Leschber, student at Taylor High School, who first heard of the incident when she was in 8th grade at Taylor Middle School; Chad Lincoln, a student at Taylor High School; Sheri Snook, a student who started Taylor High School as a 9th-grade freshman in 1985-86 and was assigned to Mr. Stroud's biology class; Kim Caesar, former Taylor High student, currently an elementary school teacher; and Lee Ann Mueller, student at Taylor High School, two years behind Cherry Fugate.

Mr. Stroud testified under oath in sworn deposition that Defendant Lankford knew of Stroud's involvement with Cherry Fugate and that Defendant Lankford had discussed the matter with him.

In September of the 1985-86 school year, a new and different 9th-grade freshman, Sheri Lynn Snook, became the victim of Mr. Stroud's sexual harassment according to the depositions of Mr. Stroud, Cherry Fugate, and this victim, Sherri Snook. In a similar manner, according to both the offender, Stroud, and the victim, Sheri Snook, Mr. Stroud gave Sheri gifts, walked her to class, called her at home from school property (the high school field house), hugged her and put his arms around her.

Attached to his deposition are notes which Stroud wrote to Sheri Snook and delivered to Sheri at school. These notes were signed, "Love, Me," and contained many references to Sheri Snook's physical appearance. Stroud also expressed jealousy toward Sheri Snook's teenage boyfriend in these notes. According to both Snook's and Stroud's depositions, Mr. Stroud encouraged the girl to keep his notes secret because he feared that people would "misinterpret" his note writing if it were discovered.

Despite Mr. Stroud's efforts, the plaintiff has ample evidence that Stroud's harassment of Sheri Snook was well-known in the Taylor High School community. According to the depositions of Sheri Snook and fellow student Lee Ann Mueller, students and other teachers were aware of Mr. Stroud's notes to Sheri. Sheri Snook testified that she was teased by students and coaches about her relationship with Mr. Stroud. According to her testimony, Mr. Kuhl, a coach at Taylor High School, even suggested that she was having sexual relations with Mr. Stroud.

In the fall of school year 1987-88, Stroud again exhibited this pattern with a third 9th-grade freshman girl. This time it

was the plaintiff, Jane Doe. Numerous members of the Taylor High School community again noticed the offender's pattern of sexual harassment of 9th-grade freshman girls enrolled in his biology class, including Mr. Potts, a coach at Taylor High School, and Sheri Snook, Colleen Leschber and Lee Ann Mueller, all students at Taylor High School.

Additionally, the plaintiff alleges that Stroud's general practice of differential treatment in his classroom toward female students was evident to the community. The depositions of the plaintiff, Cherry Fugate, Sheri Snook and Kim Caesar support the plaintiff's allegations. According to Stroud, himself, Cherry Fugate, Kim Caesar and the plaintiff, Stroud would give his "favorite girls" (female students) higher grades for less work, allow them to drive his pickup truck without a driver's license, write excuses for them if they were tardy or missed assignments, and would intercede with other teachers to get their grades improved.

Defendant Lankford's knowledge of Stroud's conduct is evident through the testimony of Mary Jean Livingood, the Taylor High School librarian. She heard many complaints of Stroud's favoritism toward his female students. On numerous occasions, she witnessed, this teacher hugging, touching and engaging in unprofessional behavior with female students in the halls of Taylor High School. She reported these observations and complaint to Eddy Lankford during the 1985-86 school year.

According to the librarian's testimony at her deposition, Mr. Landford indicated to her that he would talk to the school's athletic director, Eddie Spiller, about the offender's conduct. According to the deposition testimony of the athletic director, Eddie Spiller, Mr. Lankford never discussed the matter with Mr. Spiller.

According to his own deposition, Mr. Landford made no documentation of Ms. Livingood's reports or any other report he received of Mr. Stroud's behavior.

In the spring of 1986, Ms. Livingood, the school librarian, again observed Mr. Stroud's harassment of female students. This time, according to her deposition testimony, she observed Mr. Stroud handling a female student in a very personal way in the xerox room of the school library. She again reported the incident to Mr. Lankford, the school principal. This time she reported the incident the day that it happened, telling him that it looked like "child molestation." Mr. Lankford claims to have received only one complaint from Ms. Livingood; however, neither complaint was documented according to Lankford's deposition. According to Mr. Stroud's deposition, Mr. Lankford never talked with Stroud about the incident.

By August of 1986, one month after becoming superintendent, Defendant Caplinger received reports that Coach Stroud gave female students special privileges in his biology classes. According to Caplinger's deposition, he heard in August 1986 that Stroud allowed girls to record grades in the grade book and allowed girls to be dismissed from class early. According to Defendant Caplinger's own deposition, Caplinger did not document these reports. He admits that his recollection of the reports is hazy. He claims that he asked Defendant Lankford to talk with Mr. Stroud about Stroud's favoritism; however, Stroud does not recall discussing the reports with Defendant Lankford.

The plaintiff, Jane Doe, started high school at Taylor High School in the fall of 1986. She was assigned to Mr. Stroud's biology class. This time, the plaintiff, Jane Doe, was the student that Stroud singled out. Stroud's harassment of her followed the pattern he demonstrated with Cherry Fugate and Sheri Snook.

B. Lankford and Caplinger's Failure to Respond to Stroud's Conduct Toward the Plaintiff

According to the plaintiff, Mr. Stroud, and Lee Ann Mueller, Stroud began his harassment of the plaintiff by writing notes to the plaintiff on her test papers. He said things like "Hi pretty" and "You look really nice today." Mr. Stroud carried on correspondence with the plaintiff, just like he had with other freshman girls in earlier years. According to his own deposition, Stroud encouraged the plaintiff to treat him as a friend and confidant, as he had "encouraged" other girls.

In November, 1986, Mr. Stroud furthered his sexual harassment and began his sexual assault on the plaintiff by grabbing the plaintiff and kissing her at the field house after a basketball game.

Mr. Stroud's harassment of the plaintiff continued via Sunday basketball games at the field house. According to Stroud's deposition and according to Lee Ann Mueller's deposition, Stroud would arrange to meet the plaintiff and other children at the field house on Sundays to play basketball. He introduced the plaintiff to his teenage daughter, Marcie. The plaintiff and Marcie became friends.

During the fall and spring, Stroud's sexual harassment/assault of the plaintiff escalated during and after school hours. Stroud kissed, petted and engaged in foreplay toward the plaintiff, both on and off school property. According to the depositions of the plaintiff, Stroud, Lee Ann Mueller, and Brittani Barron, Stroud called the plaintiff at home many times on her private line and allowed her to call him at the field house. He took the plaintiff out of his classroom during class hours into the adjoining lab room, where he would sexually harass/assault her by kissing and touching her in a sexual manner. He would also call her out

of other teachers, classrooms to engage in this behavior in the lab room.

In January, 1987, Stroud took the plaintiff to a concert in Austin, bought her alcohol, and sexually harassed/assaulted the plaintiff by kissing her. After the concert, Stroud sexually assaulted the plaintiff at the Taylor High School field house by "heavy petting," kissing and undressing the plaintiff. Stroud sexually harassed/assaulted the plaintiff by unbuttoning the plaintiff's pants and blouse, touching her breasts and genitals, kissing the plaintiff and asking the plaintiff to have sexual intercourse with him. The plaintiff refused.

After a Valentine's Day dance, the plaintiff spent the night at Stroud's house. Stroud used his own teenage daughter as a pretext to persuade the plaintiff to spend the night. Again, the plaintiff refused to have sexual intercourse with him.

Several students, including Lee Ann Mueller, Gary Faltesek, Colleen Leschber, Tammy Moeller, Sheri Snook and Brittani Barron became aware of Stroud's sexual harassment and abuse of the 14-year-old plaintiff. Most of these students were aware of Stroud's prior sexual harassment of other teenage girls.

Stroud persisted in sexually harassing/abusing the plaintiff. Around Valentine's Day, 1987, Stroud gave the plaintiff a Valentine in class. The Valentine read, "To my most favorite, prettiest, sweetest, nicest, sweetheart in the world! Please don't change cause I need you. I'm in love with you. Forever — for real — I love you." This is documented in the deposition of the school guidance counselor, Naomi Paseman, in the deposition of Stroud, and in the deposition of student Brittani Barron.

Brittani Barron found the Valentine in the plaintiff's purse and took it to Defendant Lankford. Ms. Pasemann was also present. Brittani told Defendant Lankford and Ms. Paseman

that she found the Valentine in the plaintiff's purse and that Stroud had sent it to the plaintiff. Brittani told Ms. Pasemann that Stroud had kissed the plaintiff and that she thought that they were having sexual intercourse.

According to both Defendant Lankford's and Naomi Pasemann's depositions, Lankford and Pasemann discussed the conversations they both had with Brittani.

According to Brittani Barron's deposition, when Brittani told Defendant Lankford, himself, that she thought Mr. Stroud was sexually abusing the plaintiff, Defendant Lankford told Brittani that he was aware of the rumors surrounding Mr. Stroud and the plaintiff. According to Brittani's deposition, Defendant Lankford told her that Mr. Stroud just had a way of flirting with the girls.

According to the school guidance counselor, Naomi Pasemann's deposition, Brittani Barron's deposition, and Mr. Stroud's deposition, Defendant Lankford did nothing but transfer Brittani out of Stroud's class, an act which could be interpreted as protecting Stroud's illegal conduct.

Parents, other faculty at Taylor High School, the plaintiff, other students, both male and female, all noticed Stroud's blatantly differential treatment toward females in his biology class. According to parents, faculty, the plaintiff and other male and female students, Stroud allowed those girls in his class who flirted with him to grade tests and enter grades in his grade book. He allowed them to put down better grades for themselves and their friends than for other male or female students. He allowed those girls to receive good grades without effort. He gave these girls hints on tests and encouraged them to congregate around his desk during class. He allowed them to drive his pickup, even though they did not have driver's licenses. He wrote passes for them to leave class or to leave school during school hours. He graded them more favorably than other students. He would eat lunch with

his favorite female students. He made sexually suggestive comments in the classroom and used and allowed students to use abusive language.

Parents, faculty and other students reported Stroud's differential conduct and sexual harassment to Defendant Lankford. Naomi Pasemann, the school counselor, reported Mr. Stroud's conduct to Defendant Lankford at least twice during the 1986-87 school year. She also reported the complaints which she received from other faculty, students and parents.

Brittani Barron, a student at Taylor High School, and her father, Bruce Barron, relayed their concerns that Stroud was sexually harassing or assaulting the plaintiff, to Naomi Pasemann, who then relayed these concerns once again to Defendant Lankford.

During the spring of 1987, Stroud's harassment/abuse of the plaintiff was common knowledge among faculty, staff, parents, and students. Both Mr. Spiller and Mr. Schroeder, Taylor High School's athletic directors, knew of Stroud's conduct. Mr. Jones, a coach at Taylor High School, knew about Stroud's behavior. Mr. Potts, a teacher and coach at Taylor High School, knew of Stroud's conduct.

On February 20, 1987, Mr. Miller, Assistant Principal to Taylor Middle School, reported to Superintendent Caplinger that Stroud had behaved unprofessionally with the plaintiff at a basketball game. Mr. Miller reported Stroud's unprofessional conduct because he had heard rumors about Stroud's sexual behavior toward the plaintiff.

According to his own deposition, Defendant Caplinger discussed Mr. Miller's report with Defendant Lankford and the athletic director, Mr. Spiller.

According to Defendant Lankford, Mr. Spiller reported to Defendant Lankford that Mr. Spiller had, previous to Mr.

Miller's report, spoken with Stroud very seriously about Stroud's behavior. According to Defendant Lankford, Defendant Lankford discussed Mr. Spiller's report to Lankford with Caplinger; however, according to his own testimony, Defendant Lankford did not question Mr. Spiller about why he had spoken to Stroud about his behavior prior to Mr. Miller's report. Lankford claims to have relayed most of the reports he received about Stroud to Defendant Superintendent Caplinger; however, Defendant Superintendent Caplinger denies having received knowledge of Stroud's conduct between August, 1986, and Mr. Miller's report in February, 1987. Defendant Caplinger further denies receiving any further reports of Stroud's behavior during the spring of 1987. *See* pages 150-170 of Lankford's deposition, especially pages 159-161.

In March or April, 1987, Stroud had sexual intercourse with the plaintiff at his home. The plaintiff was 15 years old and had not had sexual intercourse prior to that time. Stroud used his daughter, Marcie, as a pretext to lure the plaintiff to spend the night with Stroud. Over the next several months, Stroud had sexual intercourse with the plaintiff in a variety of places, including the high school field house, in the countryside near the school, and at Stroud's home. At least twice Stroud engaged in oral-genital sexual contact with the plaintiff.

In June, 1987, Stroud took the plaintiff, her female cousin, and his daughter to the Corn Festival in Holland, Texas. He provided alcohol to the girls, and the plaintiff and her cousin got drunk. After Stroud's wife became angry with Stroud because he was dancing with the plaintiff, Stroud left the Corn Festival and took the plaintiff out into the country in his truck, where he had sexual intercourse with the plaintiff. Stroud returned to the Corn Festival with the plaintiff, retrieved his daughter and the plaintiff's cousin, and took

them to his house, where they all spent the night. Stroud had sexual intercourse with the plaintiff again that night in his home. (According to Stroud's own deposition, and according to the depositions and affidavits of Tammy Moeller, the plaintiff's cousin, Brandy Poston, and Lee Ann Mueller, Stroud often bought alcohol for the plaintiff and other underaged high school girls.)

Having witnessed Stroud's improper conduct at the Corn Festival, two concerned parents, Mr. Warner and Mr. Leschber, reported Stroud's behavior at the Corn Festival to Defendant Superintendent Caplinger on approximately July 2, 1987. These parents told Defendant Superintendent Caplinger that Stroud had been inappropriate in his contact with these girls and that the girls may have gone home alone with Stroud after the festival. They reported Stroud's favoritism in the classroom.

According to Defendant Caplinger, he telephoned the parents of one of the girls mentioned by Mr. Warner and Mr. Leschber. Her parents told him that she had not been to the Corn Festival. Defendant Caplinger dismissed the entire report by Mr. Warner and Mr. Leschber as untrue and did not contact the plaintiff's parents. According to Stroud's deposition, no one ever mentioned to him that his behavior at the Corn Festival was inappropriate.

Defendants Lankford and Caplinger received another complaint regarding Stroud on or about July 15, 1987. The plaintiff's parents found photos of Stroud among the plaintiff's possessions. These photos had handwritten notes from Stroud on the back of them. These notes were similar to the Valentine that Brittani gave to Defendant Lankford in February, 1987. The notes included such remarks as, "please don't ever change and don't ever leave me. I want to be this close always—I love you—Coach Lynn Stroud."

Immediately upon finding the notes, the plaintiff's parents turned the photos and notes over to Defendant Caplinger. According to the plaintiff's mother's affidavit, Defendant Caplinger had heard other rumors about Coach Stroud and other students, including the plaintiff.

Although Mr. Caplinger indicated to the plaintiff's parents that he would convene a meeting of all parties concerned, including the offender, his superiors, and the plaintiff's parents, no such meeting was held.

According to Defendant Lankford's affidavit Defendant Caplinger showed the photo/notes to Lankford. Lankford met with Stroud and warned Stroud that he would be fired "if there were something going on."

According to the plaintiff's affidavit, she didn't see Coach Stroud "for about a month" after her parents' meeting with Defendant Caplinger. Coach Stroud called her in August to find out what she had said at the meeting with Defendant Caplinger. He continued to call her.

In September, 1987, when school started again, Coach Stroud "started walking [the plaintiff] to classes and stuff again." Her October 12, 1987 affidavit states:

> I told him to "Stop It," but he never did stop walking with me to my class, and it just started up again. Coach Stroud started writing me letters again saying that he would call me (at home), like at 6:30 PM or 7:00 PM, This was about a week after school started. Then Coach Stroud started tell (sic) me what time to meet him, sneaking out, late, he would pick me up and we would go to the fieldhouse or just ride around. When Coach Stroud and I would ride around he would stop his truck, like out in the county and we had intercorse (sic). When Coach Stroud and I went to the field house we would have intercorse (sic). Coach Stroud used protection, a Condom. Coach Stroud and I kept doing this until I guess last week or until my parents of this lawyer (sic). The last time Coach Stroud and I had intercorse (sic) was, (sic) Tues. after one of my vollyball (sic) games, it

was a out of town game, we were playing Waco, about two weeks ago, it was either the 22nd or 29th of Sept., 1987. I sneaked out of the house and meet (sic) Coach Stroud and we went to the fieldhouse and had intercorse (sic). The time before this that Coach Stroud and I had intercorse (sic) at the fieldhouse was after the Rockdale football game, Sept. llth, 1987.

Wed. (10-7-87) my father, [name deleted] took me in to talk with their lawyer, Richard Hickok and he taped our conversion (sic). I told Mr. Hickok the truth about Coach Stroud and myself and that we have had intercorse (sic). This was the first time I have ever told anyone the whole truth about it. During the time Coach Stroud and I were having a relationship sexually, I never told him "No" because I just did not know what to say and I was scared. If I told him "No" I really did not know what he would do. I guess I throught (sic) Coach Stroud would just turn on me completely. Coach Stroud did tell me that if anyone knew about us that he could loose (sic) his job, family.

III. STATEMENT OF APPLICABLE LAW

A. Summary Judgment Standard

The Court may grant summary judgment under F.R.Civ.P. 56(c) if the record reveals no genuine issue as to any material fact, and (2) the proving party is entitled to judgment as a matter of law. *Celotex Corp.* v. *Catrett,* 106 S.Ct. 2548, 2552-53 (1986). In deciding whether to grant summary judgment, the Court should review the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. *Pharo* v. *Smith,* 621 F.2d 656, 664 (5th Cir. 1980); *Jacobs* v. *Provident Life & Accident Ins.,* 837 F.2d 213, 215 (5th Cir. 1988).

A short review of the defendants' Motion and the plaintiff's Response reveals that a substantial question of material fact exists in this case. The defendants are not entitled to judgment as a matter of law, as set out below.

B. Law Governing Qualified Immunity Defense

The question before the Court is whether the facts, as alleged by the plaintiff, support a claim of violation of clearly established statutory or constitutional rights of which a reasonable person would have known. *Brawner* v. *City of Richardson,* 855 F.2d 187, 190-191 (5th Cir. 1988); *Thompson* v. *City of Starkville,* Miss., 901 F.2d 456, 459 (5th Cir. 1990); *Mitchell* v. *Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); and *Harlow* v. *Fitzgerald,* 457 U.S. 800, 818 S.Ct. 2727, 2738, 73 L. Ed.2d 396 (1982).

Specifically, *Brawner* requires a two-step process:

(1) the initial determination is whether the claim itself is viable, whether the . . , plaintiff [is] constitutionally protected " and "

(2) if so, the next step is an evaluation of whether the "constitutionality right asserted was 'clearly established' at the time of [the public official's] conduct so that a reasonable official would have understood that his conduct violated that right." *Brawner,* 855 F.2d at 191.

Mitchell v. *Forsythe,* 472 U.S. 511, 105 S.Ct. 2806 (1985), additionally requires that the plaintiff produce evidence sufficient to create a genuine issue of material fact as to whether defendants in fact violated those rights.

IV. ANALYSIS

A. The Plaintiff is Constitutionally Protected.

The plaintiff has a constitutional right to be free from bodily harm via the substantive Due Process Clause of the Fourteenth Amendment. *Rochin* v. *California,* 342 U.S. 165, 172-74, 72 S.Ct. 205, 210 (1952).

According to *Rochin,* the court should consider whether the conduct itself "shocks the conscience." *In Jefferson* v. *Ysleta Independent School District,* 817 F.2d 303, 305 (5th

Cir. 1987), the Fifth Circuit Court of Appeals affirmed Judge Bunton's shocked conscience, stating:

> ... in January, 1985, a competent teacher knew or should have known that to tie a second grade student to a chair for an entire school day and for a substantial portion of a second day, as an educational exercise was ... constitutionally impermissible.

(as quoted in *Savidge* v. *Fincannon,* 836 F.2d 896, 909 (5th Cir. 1988).

This Court would argue that in this case in the school years 1986-87 and 1987-88, the defendants knew or should have known that to tolerate a high school biology teacher who courts, seduces, sexually molests, and statutorily rapes a ninth grade student for an entire school year and a portion of another school year, for any reason, was at least as constitutionally impermissible as the conduct described in the *Ysleta* case.

If the conduct of the defendants, as principal and superintendent of a high school and school district, respectively, does not shock the conscience of the court, then the court's conscience has become seriously eroded.

Like the second grader tied to a chair for a day and a half, unable to go to the bathroom, the plaintiff in this case was tied to an awful secret for more than a year, a secret which deprived her of a normal social and intellectual high school career. Separated from her peers, she finished high school in another district.

There can be no doubt that the facts alleged demonstrate that the plaintiff was deprived of bodily integrity and that she was subject to bodily harm. Likewise, the facts alleged clearly demonstrate the defendants, knowledge of Stroud's inappropriate conduct.

Further, the plaintiff has a constitutional right to an education that is equal to that of male students under the equal

protection clause of the Fourteenth Amendment, as well as under other federal statutes. She has a constitutionally protected right to an education that is free from the hostile environment created by sexual harassment. She has a right to be free of sexual discrimination at school.

In *Meritor Savings Bank* v. *Vinson,* 477 U.S. 57, 106 S.Ct. 2399, 2409 (1986), the Supreme Court ruled that "hostile environment" sexual harassment is a form of sex discrimination prohibited by Title VII. If "hostile environment" sexual harassment of women in the work place (women, who are legally free to terminate employment rather than reveal the harassment to others, or tolerate the harassment) is unconstitutional, as held by the Supreme Court, then the toleration of sexual molestation or harassment of a child at school (lasting for more than one year, a child who is not legally free to leave school, but must choose between admitting (1) the heinous acts described revealing the secret imposed by an authority figure, or (2) suffering the abuse) is equally unconstitutional.

The Constitution, which protects women in the work place, must extend to women in high school. Although still minors, high school females, as evidenced by the facts alleged in this case, face the same type of "hostile environment" sexual harassment and actual sexual abuse as women in the work place. In this case, the constitutional violation is exacerbated by the plaintiffs, *involuntary* attendance at school and her lack of understanding and experience.

To decline constitutional protection to underage females but to extend such protection to working women, is to undermine the entire policy behind extending such protection to working women in the first place. In cases such as *Meritor,* the Supreme Court has clearly stated that authority figures who knowingly tolerate abusive, inappropriate, sexual conduct in subordinates will be held liable for such

conduct. Public policy dictates that people be free from such abuse whether at the work place or at school. In this case, school was as much the plaintiff's work as the working world was to the woman in *Meritor.*

B. Such Protection Was 'Clearly Established'

According to *Thompson,* 901 F.2d at 459 (5th Cir. 1990), whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken . . ." *Anderson* v. *Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

Thus, the inquiry in the instant case turns on whether, assuming the plaintiff's allegations to be true, Lankford and Caplinger violated rights of the plaintiff that were clearly established at the time of their actions. That is, whether the individual defendants would reasonably have known that their actions would violate the plaintiff's Fourteenth Amendment right to equal protection. "Clearly established" means that the contours of the right were so clear at the time the officials acted that a reasonable official would have understood that he violated that right. The very action in question need not have been previously held unlawful; the unlawfulness of the action must be apparent in light of pre-existing law. See *Thompson* and *Brawner.*

In determining what a reasonable school administrator should know in this instance, it is not necessary to point to a precedent which is on all-fours with the case at bar. It suffices that the official be aware of general, well-developed legal principles. *Jefferson* v. *Ysleta ISD,* 817 F.2d 303, 305 (5th Cir. 1987). *CF. Sourbeer* v. *Robinson,* 791 F.2d 1094

(3rd Cir. 1986), *cert. denied*, ... U.S. ...., 107 S.Ct. 3276, 96 L.Ed.2d .... (1987).

A person's constitutional right to be free from bodily harm occasioned by state officials was established in 1952 by the Supreme Court in *Rochin* v. *California*, 342 U.S. 165, 172-74, 72 S.Ct. 205, 210 (1952).

In May, 1987, in *Jefferson* v. *Ysleta ISD*, 817 F.2d 303, 305 (5th Cir. 1987), the Fifth Circuit made crystal clear the right clearly established by previously well developed legal principals. Citing *Schillingford* v. *Holmes*, 634 F.2d 263, 265 (5th Cir. 1981), which cites *Hall* v. *Tauney*, 621 F.2d 607, 613 (4th Cir. 1980), the Fifth Circuit in *Ysleta*, stated:

> the right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process .... The same applies to state-occasioned restraints which are not justified by the victim's conduct or other extenuating circumstances.

Jefferson v. *Ysleta ISD*, 817 F.2d at 305 (5th Cir. 1987). The defendants' restraint, a conspiracy of silence, was not justified by the plaintiffs' conduct nor by any other circumstances.

The plaintiff's right to freedom from "hostile environment" sexual discrimination was well established by the Supreme Court in June, 1986, in the *Meritor* case. *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 206 S.Ct. 2399, 2409 (1986). Further, Title VII and Title IX issues were at the forefront of education law in the 1970's and 1980's. Aggravated sexual assault statutes existed in 1986 and 1987 and had been long standing and well established in Texas. (*See* § 22.011f.f. Texas Penal Code, as amended in the 1985 Reg. Session, effective September 1, 1985.)

The defendants argue in essence that there is no "White Horse" Fifth Circuit case law which clearly establishes the

plaintiff's constitutional right. A "White Horse" case is not required under *Ysleta,* 817 F.21d 303, 305 (5th Cir. 1987). *See* fn 1.

The defendants' reliance on *DeShaney* and *Stoneking* is misplaced. *DeShaney* v. *Winnabago County Department of Social Services,* 489 U.S. . . . , 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *Stoneking* v. *Bradford Area School District I,* 856 F.2d 594 (3rd Cir. 1988), vacated and remanded, 109 S.Ct. 1333 (1989) (*Stoneking II*), 882 F.2d 720 (3rd Cir. 1989, *cert. denied,* 110 S.Ct. 840 (1990).

The defendants argue that because a "duty to protect" was not established by the U.S. Supreme Court until 1989 in the *DeShaney* case, the plaintiff's rights could not have been "clearly established" at the time of the defendants' conduct. This argument fails for two reasons. (1) As stated earlier, the plaintiff does not allege a "duty to protect." The defendants' deliberate indifference to the plaintiff's rights, the defendants' toleration of Stroud's known behavior are the issues in this case. Any reasonable person would have or should have known that Stroud's conduct was illegal and that toleration of such conduct by his employer and immediate supervisor would violate the plaintiff's known rights. (2) Further, the law does not require a U.S. Supreme Court case, or even a "white horse" case. *Ysleta,* 817 F.2d 303, 305 fn. 1 (5th cir. 1987). The law only requires that the conduct be proscribed under general, well-developed legal principles. *Ysleta* at 305.

The defendants claim that because *Stoneking I* was remanded by the U.S. Supreme Court for analysis in light of *DeShaney*, the law cannot be considered "clearly established;" however, the U. S. Supreme Court denied certiorari to the school district challenging the *Stoneking II* court and allowed a judgment to stand against a school district on facts very similar to these.

The defendants argue that because the plaintiff was not physically restrained by state authority, the defendants could not have known that her Fourteenth Amendment rights were compromised. Citing *Ingraham* v. *Wright*, 430 U.S. 651, 670, 97 S.Ct. 1401, 1412, 51 L.Ed.2d 711 (1977), the defendants argue that "even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment." Unfortunately, the record in the case before the Court is replete with numerous cries of "foul" from friends (Mr. Warner and Mr. Leschber), family (Plaintiff's mother and father), other teachers (the school guidance counselor and the school librarian), and other pupils (Brittani Barron) and even from a fellow principal (Mr. Miller, cries of "foul" that fell on deaf ears! When the protests of the entire community are ignored by the officials responsible, or when the officials are deliberately indifferent to the pleas for action made by the community, as the facts presented here indicate, the policy stated by *Ingraham* is abrogated and cannot hold.

C. The Evidence Presented Produces a Genuine Issue of Material Fact

Because the defendants and the plaintiff do not agree on the facts, and because the plaintiff has presented voluminous records to the Court that support the facts alleged by the plaintiff, the plaintiff has met the burden set forth in *Mitchell* v. *Forsythe*, 472 U.S. 511, 105 S.Ct. 2806 (1985).

This Court finds that a reasonable trier of fact could find a violation of the plaintiff's clearly established constitutional rights. The plaintiff's allegations and the acts of the individual defendants should be submitted to the jury.

More specifically, the defendants' conduct, especially that of Defendant Lankford, could be construed as tacit approval

of or even vicarious complicity with Stroud's conduct. Certainly the professionals on Defendant Lankford's staff, such as the librarian and the guidance counselor who spoke to Mr. Lankford repeatedly regarding Stroud's conduct without result, must have sensed Lankford's complicity or protection of the offender, Stroud. Certainly the students, who heard of Stroud's conduct in junior high school and then lived through it in high school, observed the administration's complicity. Students, such as Brittany Barron, who found the courage to confront Mr. Lankford regarding Stroud's conduct were routinely ignored. Even the assistant principal of the junior high school, Mr. Miller, a professional colleague of Lankford and Caplinger, was ignored.

In the Court's opinion, these issues should be submitted to the jury. While the defendants may not have held a "duty to protect" the plaintiff, they certainly had a duty to respond to the parents, teachers, students and fellow administrators, blatant protests against the offender's conduct. Under the U.S. Supreme Court opinion in *Meritor Savings Bank* v. *Vinson,* 477 U.S. 57, 106 S.Ct. 2399, 2409 (1986), the defendants had a duty to eradicate from the work place and by analogy, the students' learning environment, that which produced "hostile environment" sexual discrimination. Defendants Lankford and Caplinger personally tolerated a pattern of conduct which violated a clearly established constitutional or statutory right. The conduct of defendants Lankford and Caplinger, as alleged by the plaintiff, raises a reasonable question of fact: "Did the defendants tolerate Stroud's abuse to the point that they actually condoned the abuse?"

The facts presented and the law at the time demonstrate that a reasonable official would have understood that his conduct violated the plaintiff's right to equal protection.

The defendants argue that a student has no constitutionally protected right to a *safe* environment in school. *Grubbs* v. *Aldine Independent School District*, 709 F.Supp. 127, 130 (S.D. TX 1989). The Court would argue that *safety* is not the issue in this case. Known "hostile environment" sexual harassment in violation of the equal protection clause and other federal statutes is the issue.

At the very least, the defendants deprived the plaintiff of a free, *appropriate* education without due process of law.

It is therefore the ORDER of the Court that Individual Defendants Lankford and Caplinger's Motion for Summary Judgment on the basis of qualified immunity be in all things DENIED.

SIGNED and ENTERED this *22nd* day of August, 1991, at Austin, Texas.

STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE

1:89-CV-00271

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MOTION FILED

DEC 16 1992

No. 92-908

In the
Supreme Court of the United States

October Term, 1992

Mike Caplinger and Eddy Lankford,
Petitioners,

v.

Jane Doe,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FIFTH CIRCUIT COURT OF APPEALS

MOTION TO APPEAR AS AMICI CURIAE AND BRIEF AMICI CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In the

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October Term, 1992

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and
Eddy Lankford,
Petitioners,

v.

Jane Doe,
Respondent.

MOTION OF
THE NATIONAL SCHOOL BOARDS ASSOCIATION
AND THE NATIONAL ASSOCIATION OF
SECONDARY SCHOOL PRINCIPALS
TO APPEAR AS AMICI CURIAE
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

The National School Boards Association (NSBA) and the National Association of Secondary School Principals (NASSP) move this Court for leave to participate as Amici Curiae herein, for the purpose of filing the attached brief in support of the Petition for

Writ of Certiorari. Petitioners have consented to the filing of the brief. Petitioners' letter of consent is on file with the Clerk of this Court. Respondent has refused to consent. Letter of refusal is on file with the Clerk of this Court.

NSBA is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

NASSP is a voluntary association of approximately 43,000 administrators of public and private schools throughout the United States. NASSP was organized in 1916 to aid

in the improvement of educational programs for students enrolled in these schools and to provide a spokesman for secondary school administrators on matters of education policy. The organization sees the issues involved in the case at bar as of the utmost importance to its members and to the students in their charge.

The principles established by the lower court, if left standing, could significantly expand liability of local school boards and school officials for alleged negligence of school administrators in failing to protect students. Given the perceived "deep pockets" of school districts and their administrators, plaintiffs will seek damages in federal courts under 42 U.S.C. § 1983, for injuries to students inflicted by the perpetrators, who are "judgment proof." Amici believe that it is critical to the efficient conduct of

public education and maintenance of public confidence and support in public schools that school administrators be free to exercise their professional judgment on behalf of students and teachers alike without subjecting themselves and their boards to potential liability which a student may suffer as the result of the criminal acts of others. In short, neither the board nor its administrators should be made the insurer of student well-being, under strained interpretations of civil rights law. Furthermore, state tort laws are adequate to provide a remedy to students where injuries result from gross negligence of school officials.

The National School Boards Association and the National Association of Secondary School Principals urge this Court to grant them leave to present their views.

Respectfully submitted,

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OTHER AUTHORITIES:

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No. 92-908

In the

Supreme Court of the United States

October Term, 1992

Mike Caplinger
and
Eddy Lankford,
Petitioners,

v.

Jane Doe,
Respondent.

BRIEF AMICI CURIAE OF
NATIONAL SCHOOL BOARDS ASSOCIATION
AND NATIONAL ASSOCIATION OF
SECONDARY SCHOOL PRINCIPALS
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the

nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

The National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 43,000 administrators of public and private schools throughout the United States. NASSP was organized in 1916 to aid in the improvement of educational programs for students enrolled in these schools and to provide a spokesman for secondary school administrators on matters of education policy. The organization sees the issues involved in the case at bar as of the utmost importance to its members and to the students in their charge.

The principles established by the lower court, if left standing, could significantly expand liability of local school boards and school officials for alleged negligence of school personnel in failing to protect students. Given the perceived "deep pockets"

of school districts and their supervisory employees, plaintiffs will seek damages in federal courts under 42 U.S.C. § 1983, for injuries to students inflicted by the perpetrators, who are "judgment proof." Amici believe that it is critical to the efficient conduct of public education and maintenance of public confidence and support in public schools that school administrators be free to exercise their professional judgment on behalf of students and teachers alike without subjecting themselves and their boards to potential liability for the injury which a student may suffer as the result of the criminal acts of others. In short, neither the board nor its administrators should be made the insurer of student well-being under strained interpretations of civil rights law.

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in brief of Petitioners.

REASONS FOR GRANTING THE WRIT

The implications of the decision in this case are vast, given the fact that the analysis used by the lower court in the case at bar is also being followed by numerous other courts, holding school districts and school supervisory officials liable under Section 1983 for their alleged negligence in supervising teachers and other personnel. The cases invoke the same theory to hold school districts and supervisory personnel liable for injuries to students whether the actions allegedly causing the injuries were committed by employees or by other students, and whether or not the injuries occurred off campus or on campus and even impose liability for actions which, if true as alleged, were nothing more than negligent.

The substantive due process issue is very complex and many lower courts do not even attempt to develop a cogent analytical base for their decisions, making it difficult for

schools and their counsel to follow the cases in developing a legal defense. Courts use substantive due process as a constitutional "catch all" to hold schools liable under Section 1983 for injuries to students which do not fall neatly into explicit constitutional niches. In effect, lower courts are expanding beyond their bounds this Court's rulings in Ingraham v. Wright, 430 U.S. 651 (1977), Estelle v. Gamble, 429 U.S. 97 (1976), Youngberg v. Romeo, 457 U.S. 307 (1982), DeShaney v. Winnebago, 489 U.S. 189 (1989), and Rochin v. California,342 U.S. 165 (1952), to make schools strictly liable for injuries to students.

As noted by the Petitioners, there is also a conflict in the circuits on the question of whether schools fall into the "functional custody" category of Youngberg v. Romeo.

ARGUMENT

I. Introduction

Amici are, of course, deeply disturbed about the despicable conduct of the teacher/coach in this case. Amici and school boards and principals across the country are working diligently to develop mechanisms to prevent this kind of conduct and to prevent even the appearance of inappropriate behavior by school employees. For example, Amicus NSBA currently sits on an advisory board to the American Bar Association's Center on Children and the Law in its project, funded by the U.S. Department of Justice, to develop mechanisms to screen employees who deal with children, including children in private and public schools. NSBA also has a number of resolutions on this issue, developed by its Delegate Assembly composed of school board members from every state in the Union. One of these reads as follows:

> NSBA urges state legislatures and agencies to assist school districts in developing methods for preventing, detecting and reporting child abuse; State laws that require

> reporting of suspected child abuse should also grant immunity for liability for reports made in good faith.
>
> School boards should develop policies on this subject that protect both the students and the due process rights of any involved employees. They should also institute in-service training programs for employees and education programs for students.

In addition, NSBA runs training programs for school board members and administrators and for school board attorneys on the important policy and legal issues raised in this case. NSBA and its Council of School Attorneys have also published a number of monographs and articles on the subject of prevention of child abuse and other injuries to school children.

The lower court's zeal to compensate Petitioners for the devastating injury to her is understandable, but the Fourteenth Amendment and Section 1983 were not designed to protect the citizenry from all manner of wrongs, even if perpetrated by a public

employee. The lower court erred in concluding that the U.S. Constitution guarantees students a substantive right to be free from tortious conduct committed by school district employees. Furthermore, even if the lower court were correct in the holding on the Constitutional issue, the mechanism of attributing responsibility for the injuries in this case is not in accord with Supreme Court precedent. The "deliberate indifference" standard should be applied only in the context of Eighth Amendment violations.

I. The court below and numerous other federal courts have misapplied this Court's decisions by imposing strict liability on school districts and their supervisory employees for injuries to students.

A. There is no substantive due process right implicated in this case.

1. Historically, this Court has applied the substantive due process analysis sparingly to protect interests which are in the penumbra of explicit rights and which have been deprived by the state through statute or an ongoing official practice.

The substantive due process doctrine has been applied in a very limited fashion to include fundamental rights expressly enumerated in the Constitution such as the first amendment rights of free speech and assembly and free exercise of religion; interests which are in the penumbra of enumerated rights such as the right of privacy, Griswold v. Connecticut, 381 U.S. 479 (1965) (use of contraceptives) which is in the penumbra of the right of free association; and to overturn state statutes which implicate liberty interests and are arbitrary and without reasonable basis, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923) (involving the liberty interest in educating one's children in the school of one's choosing); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (involving the right to study a foreign language). All of these cases involved state statutes.

This Court has been reluctant to find substantive due process implications in cases which do not involve statutes. In Wood v. Strickland, 420 U.S. 315 (1975), the court of appeals found a substantive due process violation in a school board's alleged misinterpretation of its rule against the possession of alcoholic beverages on school grounds. This Court vacated the judgment, holding "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." 420 U.S. at 326.

In 1982, in a per curiam opinion, this Court reversed another attempt by the same court of appeals, through the use of substantive due process, to substitute its own judgment for that of the school board. Board of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982).

A medical student argued in the case of Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985), that he had a property interest in a medical school program which gave rise to a substantive due process right to continued enrollment free from arbitrary state action. The Court ruled that the decision to dismiss the student was not arbitrary even if it were assumed that he had a substantive due process right. In a concurring opinion, Justice Powell stated that the Court's assumption on substantive due process was unnecessary.

> While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution . . . substantive due process rights are created only by the Constitution . . . The history of substantive due process "counsels caution and restraint." Moore v. City of East Cleveland, 431 U.S. 494 (1977) . . . "Each new claim to [substantive due process] protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." [Citing

> Poe v. Ullman, 367 U.S. 497, 544 (1961)].

474 U.S. at 229.

The lower court in the instant case makes the assumption that the right to a public school education includes a substantive due process component. That assumption has no historical basis in the Constitution itself or in this Court's decisions interpreting it.

2. The openness of the schools make it unnecessary to apply the same constitutional standards used for prisons and mental institutions.

The lower court decision is based on the premise that the public schools are akin to prisons and mental institutions. The court cites Youngberg v. Romeo, 457 U.S. 307 (1982), in support of its holding.

Youngberg involved the question of state liability for care of an individual who was involuntarily committed to a mental institution. The Court held that the State has a duty to ensure his safety and to

facilitate his ability to function free from bodily restraints. The Court equated involuntary commitment of mental patients with incarceration of prisoners, stating that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed --- who may not be punished at all -- in unsafe conditions." [Emphasis supplied.] 457 U.S. at 315-16. The Court, however, vacated the lower court decision because the jury was improperly instructed on the assumption that the proper standard of liability was that of the Eighth Amendment.

The operative word in the above quote, of course, is "confine." It is difficult to understand how students, particularly at the high school level, can be said to be "confined" when they go home after school every day, go out to lunch at noon and have ready access to the principal and other

administrators and teachers. Compulsory attendance laws are not sufficient to give rise to an automatic finding of confinement for purposes of the Constitution.

Unfortunately, it appears that the lower court's holding, and the holding of a number of other lower courts as well, is based less on a finding that students are "confined" in the same manner as prisoners than on a feeling that the actions of a school employee in abusing a child are worse than the action of a jailer in abusing a prisoner and, therefore, students should receive at least the same protections as a prisoner. But it is not the actions of the perpetrator that courts should look to in determining the existence of a substantive due process right, it is the action of the state in placing the student in the school. Did the state's action place the student in a dangerous environment from which she cannot extricate herself? In this case,

the answer to that question has to be in the negative.

In DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), this Court emphasized the necessity of affirmative state restraint on individual freedom to substantive due process analysis. Using this approach, the Court refused to hold that a child has a substantive due process right to be protected by state welfare officials from intentional bodily injury inflicted by the child's father even where the officials knew the father was likely to inflict such injury.

The Court held:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. [Citations omitted.]. . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration,

> institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protection of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

489 U.S. at 200.

The Court noted, 489 U.S. at 201 n. 9, that it was expressing no view on the question of whether its decision would be different had the child been placed by the state in a foster home operated by agents of the state. In the case at bar, the lower court cited that footnote in announcing its holding that compulsory school laws have the effect of placing students in the custody of the state. (The Fifth Circuit so held, despite the fact that the injuries of which Respondent complains occurred outside the compulsory environment of the school).

The Fifth Circuit's holding reflects a development in the lower courts giving students similar substantive rights to

prisoners and involuntarily incarcerated mental patients on the premise that compulsory attendance laws place students in the "functional custody" of the state. For example, in Stoneking v. Bradford Area School District (Stoneking I), 856 F.2d 594 (3rd Cir. 1988), vacated and remanded, 109 S.Ct. 1634 (1989), the Third Circuit held that female students in a public school have a constitutional right to be free from sexual abuse by a school employee and that the "special relationship" between the students and the school districts based on the state's compulsory attendance laws gives rise to a duty to investigate the allegations and to take steps to protect the students. This Court vacated and remanded that decision in light of DeShaney. On remand, the court reached the same conclusion but without using the "special relationship" analysis. (See discussion, infra at 22).

The premise of Stoneking I derives from the erroneous view that this Court established a substantive right to be free from physical abuse in school in Ingraham v. Wright, 430 U.S. 651 (1977). That case raised the issue of whether excessive corporal punishment in the schools implicates the Eighth Amendment's proscription against cruel and unusual punishment. The Court held that, unlike prisoners, injured parties in the public schools have the power to resort to state remedies.

> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

430 U.S. at 670.

The Court agreed that students have a liberty interest in bodily integrity which is protected by procedural due process, but the Court explicitly stated that it was not ruling on the question of whether substantive due

process is implicated by excessive corporal punishment. It should be noted that a much stronger case could be made for arguing that corporal punishment implicates substantive due process, given the fact that the actions are officially sanctioned while the sexual abuse at issue here is purely in furtherance of the personal objectives of the perpetrator, and against specific school policies. Nevertheless, the "openness of the schools" argument should still prevail to differentiate students from prisoners and nothing in Ingraham supports the contention that student have a substantive right in their bodily integrity.

3. The Rochin v. California analysis has been reserved by this Court for criminal cases and is inappropriate for use in determining liability of school districts and school supervisors for the conduct of subordinates in pursuit of the latter's personal heinous objectives.

The court below cites Rochin v. California, 342 U.S. 165 (1952), for the proposition that "a state actor [cannot] use means which 'shock the conscience' in the name of the public good." No one, including Respondents, is arguing here that the teacher/coach was acting "in the name of the public good," when he injured the Petitioner. The acts were committed strictly in furtherance of his own nefarious ends.

A number of courts have cited Rochin to support a finding of a constitutional tort where a school employee's actions were so outrageous as to "shock the conscience" of the court. It takes a tremendous leap from Rochin and the criminal cases following it to a case such as that at bar where the employee's conduct is in furtherance of his personal interests and in direct conflict with the interests of the state. That does not make the acts themselves any less unconscionable, but it does call into question the court's

action in holding the state responsible for the acts.

There may be a fact situation where it would be appropriate to hold the school officials liable for conduct which "shocks the conscience," where the school, "in the name of the public good," officially imposes punishment on children which is "too close to the rack and the screw to permit of constitutional differentiation." 342 U.S. at 172. But those facts are not before the Court in this case.

B. This Court has never applied the "deliberate indifference" standard outside the context of the Eighth Amendment.

The lower court remanded the case at bar to the trial court for a finding on the question of whether the school officials "acted with deliberate indifference toward Jane Doe's firmly established constitutional rights [to be free from sexual molestation by a state-employed schoolteacher] . . . ."

The "deliberate indifference" standard for holding the state liable for tortious injuries to individuals was first announced by this Court in Estelle v. Gamble, 429 U.S. 97 (1976). That case held that the state violates the Eighth Amendment's proscription against cruel and unusual punishment where it is "deliberately indifferent" to the "serious" medical needs of a prisoner. This Court has never applied the "deliberate indifference" standard outside the context of the Eighth Amendment cases. Yet numerous lower court cases are applying that standard to hold school districts liable for injuries to students even though this Court has held that the Eighth Amendment does not apply to schools. Ingraham v. Wright.

The leading school case in which that standard was applied is the second Stoneking case, Stoneking v. Bradford Area School Dist., 882 F.2d 720 (3rd Cir. 1989), cert. denied 110 S.Ct. 840 (1990). After this Court vacated

and remanded Stoneking I in light of DeShaney, the Third Circuit Court of Appeals mused that it had the option of continuing to rest its decision on a duty to protect arising out of the "special relationship" created by the state's compulsory education laws. However, because of the "uncertainty of the law in this respect," the court instead ruled that the officials acted with "deliberate indifference" to the constitutional rights of the students through a custom that communicates condonation of the behavior. The court again erroneously cited Ingraham v. Wright for the proposition that students have a substantive right to be free from sexual molestation.

Lower courts usually apply the "deliberate indifference" standard to hold school districts and supervisory employees liable in cases brought by students against their schools for damages under Section 1983 as the result of tortious conduct by school employees or other students. Even those cases

which do not reach the question of whether there is a constitutional right to bodily integrity in the schools, apply the deliberate indifference standard in determining whether supervisory employees and the school district itself can be held liable under Section 1983 for assaults on students.

In J.O. v. Alton Community Unit School Dist., 909 F.2d 267 (7th Cir. 1990), although holding that compulsory school attendance laws do not render students unable to care for themselves to the extent that an "affirmative duty to protect that individual arises," the court nevertheless ruled that plaintiffs should be allowed to amend their complaint to allege that the school was deliberately indifferent to the safety of students because school policies "encourag[ed] a climate to flourish where innocent [children] were victimized." Plaintiffs in that case are seeking review of the decision by this Court. See also Jane Doe A. v. Special Sch. District,

901 F.2d 642 (8th Cir. 1990); Simescu v. Emmet County Dept. of Social Services, 942 F.2d 372 (6th Cir. 1991); Thelma D. v. Board of Educ., 934 F.2d 929 (8th Cir. 1991).

The standard has also been employed in cases involving assaults upon students by other students. The court below cites Lopez v. Houston, 817 F.2d 351 (5th Cir. 1987), in support of its ruling. In that case the court held that, although there was no evidence that the school district's training program was sufficiently lacking to rise to the level of "deliberate indifference," the school bus driver could be held liable for his failure to protect the plaintiff from attacks by other students on the school bus if he was "grossly negligent or deliberately indifferent." Similarly, in Paganc v. Massapequa Public Schools, 714 F.Supp. 641 (E.D. N.Y. 1989), the court held that the school district's failure to take preventive steps to protect a student from verbal and physical abuse by other

students rose to the level of "deliberate indifference." Contra Dorothy J. v. Little Rock School Dist., 794 F.Supp. 1405 (E.D. Ark. 1992), Russell v. Fannin County School Dist., 784 F.Supp. 1576 (N.D. Ga. 1992). Finally, in Maldonado v. Josey, 975 F.2d 727 (10th Cir. 1992), plaintiff claims that a teacher's failure to supervise and the principal and superintendent's "deliberate indifference" to training and supervision requirements, resulted in the strangulation of a student in an unattended cloakroom adjacent to the teacher's classroom. Plaintiffs in that case are also petitioning this Court to review their case.

Neither the lower court nor any of the other courts which have applied the "deliberate indifference" standard to schools have offered an explanation as to how they made the exponential leap from the Eighth Amendment to the non-criminal context. Certainly this Court has never made that leap.

The Court had occasion to rule directly on this question in Youngberg v. Romeo. In that case the Court ruled that although the state owes a duty to incarcerated mental patients to provide safe conditions, the trial court erred in its use of the "deliberate indifference" standard in its instruction to the jury.

> The "deliberate indifference" standard was adopted by this Court in Estelle v. Gamble, [citations omitted], a case dealing with prisoners' rights to punishment that is not "cruel and unusual" under the Eighth Amendment. Although the District Court did not refer to Estelle v. Gamble in charging the jury, it erroneously used the deliberate indifference standard articulated in that case.

457 U.S. at 312, n. 11.

In City of Canton v. Harris, 489 U.S. 381 (1989), this Court expanded the "deliberate indifference" standard to include inadequate training of police officers and courts are now misapplying City of Canton and other Section 1983 cases to hold school districts liable for

tortious acts of employees. The court below, for example, erroneously cites Collins v. Harker Heights, 112 S.Ct. 1061, 1069 (1992), for the proposition that "'deliberate indifference' in training employees provides the necessary causal link to hold a municipality liable for the torts of its employees." Petition for Cert., Caplinger v. Doe, at page A-16. That, of course, was not the holding in that case; in fact the reference to inadequate training cited by the Fifth Circuit comes from the Plaintiff's complaint in Harker Heights, not from the decision of the Court. The Court actually ruled that, under the circumstances of the case, no constitutionally protected right was implicated and, therefore, the Court had no occasion to determine whether the attribution of liability principles of Estelle and City of Canton should be extended beyond the context of the Eighth Amendment. Where courts hold that there is a substantive

constitutional right to bodily integrity in the schools and a corresponding duty to protect the student, the ruling in Canton leaves open the door to lawsuits making a "federal case" out of any injury in the schools, from assaults by students on students or employees; injuries resulting from defective equipment (athletic, shop etc.) or defective facilities; injuries allegedly resulting from inadequate supervision. Any state tort action can thus be transformed into a constitutional case.

If, indeed, there is a "special relationship" between students and schools which amounts to a duty to provide all means of protection of the student, a proposition with which Amici vehemently disagree, so as to give rise to a constitutionally protected right to safe schools -- that still does not legitimize the ruling of the court below or, indeed, the rulings of most of the lower courts on this subject. In order to violate

the constitutional right it would seem that the state would have to knowingly place children in an unsafe environment from which the student cannot extricate himself. The presence of one degenerate in a school would not seem to be sufficient to rise to constitutional proportions, particularly when the alleged incidents occurred while the student was outside the mandated environment of the school.

1. Insurance companies are refusing to cover the alleged "intentional" conduct of school district administrators in these cases and therefore these administrators are at high personal risk even to defend themselves against suit.

School districts and administrators across the country are finding it difficult, if not impossible, to find insurance to cover the kind of allegations involved in this case. Recently, an insurance carrier that provides errors and omissions coverage to over 6000 school districts across the country, announced

that it will no longer cover this type of case in their "standard" policy without "massive rate increases." Letter to August W. Steinhilber, General Counsel, National School Boards Association from Jan Pacey, Vice President, Forrest T. Jones & Company, Inc. on behalf of National Union Fire Insurance Company, (Dec. 8, 1992). Furthermore, because complaints in cases such as the one at bar allege Constitutional violations rather than state torts, the general liability policies do not cover these types of allegations.

This Court has stated that the Eighth Amendment cases, in determining "deliberate indifference," "mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." Wilson v. Seiter, 111 S.Ct. 2321, 2325 (1991). However, the school decisions that use this term use it as a substitute for "gross negligence" which does not require a particular state of mind.

Plaintiffs allege "deliberate indifference" rather than "gross negligence" merely in order to get into federal court and courts follow their lead. Thus, because of the language of the pleadings, rather than the nature of the conduct of its employees, school districts and school administrators are being forced to pay their own costs in defending these cases, and they often settle to save defense costs, even where the case is deemed to be frivolous.

II. Students' liberty rights to bodily integrity are adequately protected through state tort law, without the necessity of expanding substantive due process to include such a right.

Most states have statutorily waived the immunity of school districts from suit for the grossly negligent acts of public employees resulting in physical injury to students. Individual school employees probably would not be immune from liability if sued in their individual capacity even in those states where sovereign immunity has not been waived.

In the event that a case arises where the state does not permit a cause of action for gross negligence of a public official which implicates a student's liberty interest in bodily integrity, the Court can assess whether the reasons for not providing a remedy are rational for purposes of procedural due process. But that is not a valid reason for converting the liberty interest into a substantive due process right.

CONCLUSION

The holding below is a substantial departure from the decisions of this Court which are cited in its support. School districts and school administrators across the country need guidance from this Court on these important issues.

Amici urge this Court to review this case.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
NOVEMBER TERM, 1992

MIKE CAPLINGER
and
EDDY LANKFORD,
Petitioners,

v.

JANE DOE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT JANE DOE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the sexual molestation of a schoolchild by a public school teacher violates the due process and equal protection clauses of the Fourteenth Amendment.

2. Whether a public school superintendent and principal are liable under 42 U.S.C. 1983 where they acted with deliberate indifference to a schoolchild's constitutional right not to be sexually molested.

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D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d Cir. 1992) (en banc), *pet. for cert. filed*, No. 92-816 (U.S. Nov. 9, 1992) 11,12

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DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) 11

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Elliott v. New Miami Board of Education, 799 F. Supp. 818 (S.D. Oh. 1992) 11

Cases Continued:

Franklin v. Gwinnett County Public Schools, ___ U.S. ___, 112 S.Ct. 1028 (1992) 6

Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990) 10

Houghton v.Jones, 68 U.S. 702 (1863) 7

Ingraham v. Wright, 430 U.S. 651 (1977) 6

Jane Doe "A" v. Special School District of St. Louis County, 901 F.2d 642 (8th Cir. 1990) 5,6,9,10,11

J.O. v. Alton Community School District 11, 909 F.2d 267 (7th Cir. 1990) 10,12

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) 6,10

Maldonado v. Josey, 975 F.2d 727 (10th Cir. 1992), *pet. for cert. filed*, No. 92-1000 (U.S. Dec. 11, 1992) 11,12

Parratt v. Taylor, 451 U.S. 527 (1980) 8

Robert G. v. Newburgh City School District, 1990 WL 3210 (S.D.N.Y.) 6,10

Russell by Russell v. Fannin County School District, 784 F. Supp. 1576(N.D. Ga. 1992) 11

Sonzinsky v. United States, 300 U.S. 506 (1937) 7

Cases Continued: pages

Stoneking v. Bradford Area School District, 882 F.2d 720 (3d Cir. 1988), *cert. denied*, 493 U.S. 1044 (1990) *(Stoneking II)* 6,9,10,11

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IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1992

NO. 92-908

MIKE CAPLINGER
and
EDDY LANKFORD,
Petitioners,

v.

JANE DOE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT JANE DOE IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A-1-A-25) is reported at 975 F.2d 137. The decision of the district court (Pet. App. C-1-C-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1992. The petition for a writ of certiorari was filed on November 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Jane Doe brought this suit in the United States District Court for the Western District of Texas against Taylor Independent School District, her ninth-grade biology teacher Lynn Stroud, and petitioners, school superintendent Mike Caplinger and principal Eddy Lankford, alleging violations of, *inter alia,* 42 U.S.C. 1983 and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681. With respect to her Section 1983 claims, respondent alleged that Defendant Stroud had repeatedly sexually abused and harassed her in violation of rights guaranteed to her by the due process and equal protection clauses of the Fourteenth Amendment. She further alleged that Petitioners Lankford and Caplinger had actual or constructive knowledge of Stroud's misconduct and were deliberately indifferent to the violation of her rights.[1]

As early as 1985, Petitioner Lankford and subsequently Petitioner Caplinger received complaints that Lynn Stroud, a teacher and coach at Taylor High School, engaged in sexually-oriented favoritism and inappropriate conduct of a sexual nature with female students. Pet. App. A-3, C-3-C-5. In the fall of 1986, Stroud became respondent's ninth-grade biology teacher and "began his seduction of her by writing suggestive comments on test papers" and kissing her on the cheek as she was leaving the school field house. Pet. App. A-3. "Eventually, he began taking her into the laboratory room adjacent to the classroom and to the field house where he would kiss and touch her. " *Ibid.* He also called her out of other teacher's classrooms to engage in this behavior in the lab room. Pet. App. C-7-C-8.

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[1] The portion of the complaint quoted by petitioners (Pet. 5) omits paragraph 36 in which respondent alleged that petitioners "acted with deliberate and conscious indifference to [her] constitutional rights." Record on appeal, vol. II, p. 584.

Around Valentine's Day 1987, Stroud gave respondent a valentine in class on which he wrote, "'To my most favorite, prettiest, sweetest, nicest sweetheart in the world! Please don't change cause I need you. I'm in love with you. Forever - for real - I love you.'" Pet. App. A-3, C-8. A classmate, who had found the valentine, took it to the principal, Petitioner Lankford, and indicated that she thought that respondent and Stroud were sexually involved. Pet. App. A-4, C-8-C-9. Petitioner Lankford said he was aware of rumors and "that Stroud just had a way of flirting with the girls." Pet. App. A-4. Lankford transferred the classmate out of Stroud's class and did not investigate further. Soon thereafter, the superintendent, Petitioner Caplinger, who had received previous complaints of sexual misconduct by Stroud, learned "that Stroud was behaving 'unprofessionally' with [respondent] at a school basketball game." *Ibid.*

Stroud eventually persuaded respondent to have sexual intercourse with him in March or April of 1987. Pet. App. A-4-A-5, C-11. "Over the course of the next several months, Stroud and [respondent] had repeated sexual contact at different locations, both on and off the school grounds." Pet. App. A-5.[2]

In June 1987, two parents complained to Petitioner Caplinger that Stroud had behaved improperly with respondent and some other girls. They also complained "that Stroud exhibited favoritism toward female students in class." Pet. App. A-5. Petitioner Caplinger did not discuss the complaint with respondent's parents, and no one mentioned the incident to Stroud. Pet. App. A-5, C-12.

In July 1987, respondent's parents found among her possessions photographs of Stroud with handwritten notes on the backs similar to those on the valentine. Respondent's parents immediately met with Petitioner Caplinger, who confirmed that he was aware of rumors concerning Stroud. Pet. App. A-6, C-12-C-13. Petitioners met separately with

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[2] Petitioners state that Lankford spoke with Stroud in the spring of 1987 (Pet. 4), but Stroud stated in his deposition that he did not recall anyone speaking to him and that he would have remembered had it occurred. Stroud Dep. 486-87.

respondent and Stroud, each of whom denied that they were having a sexual relationship. Petitioner Lankford "warned Stroud that he would be fired 'if something was going on.'" Pet. App. A-6, C-13. Petitioners "were apparently satisfied that nothing was going on, based solely on the adamant denials of the alleged culprit (Stroud) and the 15 year-old victim . . . ." Pet. App. A-6.[3]

Although respondent and Stroud stayed apart for the remainder of the summer, he began walking her to classes after school started and they resumed having sexual intercourse. Pet. App. A-6, C-13. In October 1987, respondent's mother found more love letters from Stroud and consulted with their family lawyer, to whom respondent disclosed what had happened between her and Stroud. The attorney reported the abuse to Petitioner Caplinger, who on the same day received a complaint that Stroud had made unwelcome sexual advances toward another schoolgirl. Stroud was suspended and later pled guilty to criminal charges. Pet. App. A-7.

2. In a lengthy opinion, the district court denied petitioners' motion for summary judgment on their defense of qualified immunity. The district court held that the sexual molestation respondent suffered violated her clearly established constitutional right to be free from bodily harm and sexual harassment at school. Finding material factual issues in dispute, the district court held that while petitioners may not have had a duty to protect respondent, "they certainly had a duty to respond to the parents, teachers, students and fellow administrators' blatant protests against the offender's conduct." Pet. App. C-22. The district court concluded that the evidence raised a reasonable question of fact as to whether petitioners "tolerate[d] Stroud's abuse to the point that they actually condoned the abuse. . . ." *Ibid.*

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[3] Petitioners claim, without citation to the record, that Caplinger concluded that he did not have enough evidence to discharge Stroud, and they suggest that this was upon advice of counsel. Pet. 4. However, petitioners refused to reveal information about advice from counsel. Caplinger Dep. 139. Moreover, Caplinger stated at his deposition that he did not recommend Stroud's termination because he had not given Stroud a directive not to communicate with respondent. *Id.* at 191-92.

3. On interlocutory appeal the court of appeals affirmed the denial of summary judgment and remanded the case for trial. The court of appeals held that respondent "had a firmly established constitutional right under the due process and equal protection clauses of the Fourteenth Amendment to be free from sexual molestation by a state-employed schoolteacher." Pet. App. A-2. With respect to respondent's due process claim, the court of appeals reasoned "that bodily integrity is necessarily compromised when a state actor sexually assaults a schoolchild. . . and that such misconduct implicates due process." Pet. App. A-12. With respect to her equal protection claim, the court held that sexual harassment in the school setting is sex discrimination proscribed by the equal protection clause. Pet. App. A-24.

Turning to the issue of petitioners' liability, the court of appeals determined that school officials have both "a duty to police the misconduct of their subordinates and [a duty] to protect schoolchildren from hazards of which the school officials know or should know. Their deliberate indifference to these duties can form the basis of liability against them." Pet. App. A-21. The court of appeals cautioned that "[t]his does not mean that school officials are liable in the ordinary course for injuries to students inflicted by fellow students." *Ibid.* Rather, school officials are liable only for invasions "of constitutional dimensions" and only when the elements of *Jane Doe "A" v. Special School District of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990), are met, including notice of and demonstrated deliberate indifference to a pattern of unconstitutional acts. Pet. App. A-22; *see also* Pet. App. A-14.

The court of appeals held that petitioners could be found liable based on the evidence of their deliberate indifference to a known pattern of misconduct by Stroud. Pet. App. A-22-A-23. The court concluded that summary judgment was inappropriate because "a jury could find that [petitioners] *non*feasance . . . was not merely negligent, but grossly negligent, reckless, or deliberately (consciously) indifferent; that [petitioners'] toleration of Stroud's alleged misconduct for so long communicated their tacit condonation of his *mal*feasance." Pet. App. A-24. Finally, the court of appeals held that the same analysis requires sending

respondent's equal protection claim to the jury as well. Pet. App. A-24-A-25.

ARGUMENT

1. Every court of appeals that has reviewed a case of sexual molestation of a schoolchild by a teacher or other public employee has agreed with the court of appeals in this case that such abuse violates the child's Fourteenth Amendment rights. *See D.T. by M.T. v. Independent School District No. 16*, 894 F.2d 1176, 1187 (10th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 213 (1990); *Stoneking v. Bradford Area School District*, 882 F.2d 720, 726-27 (3d Cir. 1988), *cert. denied*, 493 U.S. 1044 (1990) *(Stoneking II)*.[4] Therefore, no conflict exists among the circuits warranting review by this Court on the issue presented to and decided by the court below, namely whether a public schoolchild possesses a constitutional right not to be sexually molested by her teacher. Moreover, the unanimous view of the courts of appeals is correct and in accord with the principle, recognized by this Court in *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977), that the due process clause protects against unjustified state intrusion into the bodily integrity of schoolchildren.[5]

Indeed, petitioners "do not dispute that public school students arguably enjoy a constitutional right to be free from sexual molestation by a state-employed school teacher which

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[4] *See also Jane Doe "A" v. Special School District of St. Louis County*, 901 F.2d 642 (8th Cir. 1990)(implicitly assuming that sexual abuse of school children by a school employee would be unconstitutional).

District courts have likewise found sexual abuse by a public school employee to offend the due process guarantees of the Constitution. *Viavant v. Steiner*, 1992 WL 59387 (E.D. La.); *Robert G. v. Newburgh City School District*, 1990 WL 3210 (S.D.N.Y.).

[5] The court of appeals' decision also correctly recognizes that sexual harassment and sexual abuse constitute intentional sex discrimination, which is a violation of the equal protection clause of the Fourteenth Amendment. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988); *Volk v. Coler*, 845 F.2d 1422, 1431 (7th Cir. 1988). *See also Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S.Ct. 1028, 1037 (1992)(sexual harassment and abuse of a student is intentional discrimination based on sex).

occurs during the course of school attendance or school related activities." Pet. 9. Petitioners complain, however, that the court of appeals did not make distinctions concerning the place and time of the sexual abuse. Petitioners themselves failed to raise these distinctions in either of the courts below. Specifically, petitioners did not argue, as they do before this Court, that the constitutional right alleged by respondent should be applicable only to abuse which occurs in connection with school attendance, nor did petitioners argue that respondent's ninth-grade teacher Stroud was not acting under color of state law when he molested her. Petitioners did not even cite in their briefs to the court of appeals the case on which they now chiefly rely for their argument on this issue -- *D.T. by M.T. v. Independent School District No. 16, supra*. *See* Pet. 13-14. Having failed to raise below the issue of whether the right to be free from sexual abuse should be "qualified" according to the time and location of the abuse, petitioners are precluded from raising it for the first time in this Court. *See Sonzinsky v. United States*, 300 U.S. 506, 514 (1937); *Houghton v. Jones*, 68 U.S. 702, 705 (1863).

Furthermore, respondent was sexually harassed and abused during school hours, in connection with school activities and on school property. Among other things, Stroud showed sexual favoritism toward female students in class, wrote suggestive comments on respondent's test papers, and gave her a suggestive valentine in class. He kissed and touched respondent in a sexual manner in the lab room next to his classroom during class hours, sometimes taking her out of other classes to do so. Pet. App. A-3, C-7-C-8. Stroud acted inappropriately with respondent at a school basketball game and had sexual intercourse with her in the school fieldhouse, sometimes after school games. Pet. App. A-4-A-5, C-11, C-13-C-14. Thus, the distinction petitioners seek to make "between sexual molestation which occurs in connection with school attendance and that which does not" (Pet. 12) makes no difference to the outcome of

this case since respondent in fact suffered sexual abuse in connection with school attendance.[6]

Moreover, the analysis suggested by petitioners -- that respondent's due process and equal protection rights should be qualified or restricted -- is not supported by any of the case law cited by petitioners nor by any other authority to respondent's knowledge. Rather, the proper analytical framework is that utilized by the Tenth Circuit in *D.T. by M.T. v. Independent School District No. 16*.. There, the court, following established precedent, looked to see whether sexual abuse allegedly unconnected to a teacher's public employment was committed "under color of state law." 894 F.2d at 1186-1192.[7] The Fifth Circuit did not address this issue presumably because it was not raised by petitioners. Therefore, the decision below is not in conflict with *D.T. by M.T.*.

There is also no conflict because the facts of this case are radically different from those in *D.T. by M.T.*. The Tenth Circuit found an insufficient nexus to the school district because the abuse in that case occurred during the summer when the teacher had no contractual obligations to the district and he was on a private fund-raising trip unrelated to the school. 894 F.2d at 1182-83, 1187-88. In

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[6] If petitioners are suggesting that the abuse respondent suffered in connection with her school attendance did not rise to the level of a constitutional violation, petitioners are wrong. As the evidence summarized above shows, Stroud harassed, physically assaulted and molested respondent in a variety of places at school, including in the lab and the school fieldhouse. These invasions of her bodily integrity and incidents of sexual harassment clearly violated her rights to due process and equal protection of the law.

[7] The proper analysis in determining whether there has been a violation of 42 U.S.C. 1983 is to inquire "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1980), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986).

this case respondent was victimized by one of her public school teachers during the school year and at times even during class hours, thus creating the nexus to state action which was lacking in *D.T. by M.T.*. *See also Stoneking II*, 882 F.2d at 722, 726-27 (band director's sexual molestation of a student violated her clearly established constitutional rights although some of the acts of abuse occurred in his car or in his house).

In sum, review of the first question presented by petitioners, *viz* whether a student has an "unqualified" right to be free from sexual abuse by a teacher, is unwarranted because there is no conflict in the circuits on the issue, it was not raised below, it does not affect the outcome of the case, and petitioners' unique analytical approach is unsound and unworkable.

2. Petitioners also seek review of the Fifth Circuit's conclusion that they can be held liable for injuries to respondent caused by breach of their duty to protect her from known constitutional violations. The court of appeals held, in the alternative, that petitioners could also be held liable for breach of their duty "to police the misconduct of their subordinates . . . ." Pet. App. A-21. Petitioners do not challenge the latter holding. However, the standards outlined by the court of appeals for establishing liability based on a duty to protect are the same as the standards for finding supervisory liability, which petitioners accept as correct. The standards are also the same as those adopted by other courts of appeals that have reviewed the issue of a school official's liability for sexual abuse by a subordinate.

Specifically, the court of appeals held that school officials are liable for the constitutional wrongs done to schoolchildren, under either of its two alternative theories (breach of duty to protect or breach of duty to supervise), only upon proof of the four elements set forth in *Jane Doe "A" v. Special School District of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990). Pet. App. A-21-A-22. Those four requirements are that 1) the school officials had "notice of a pattern of unconstitutional acts by subordinates," 2) they were deliberately indifferent to those offensive acts, 3) they "failed to take sufficient remedial action" and 4) their failure proximately caused the child's injuries. 901 F.2d at 645; *see also* Pet. App. A-14. The *Jane Doe "A"* "deliberate

indifference" standard adopted by the Eighth and Fifth Circuits is consistent with the standards recognized by other circuits for establishing school officials' Section 1983 liability. *See Stoneking II*, 882 F.2d at 725 (school officials may be held liable based on "policies maintained in deliberate indifference to actions taken by subordinates"); *See also D.T. by M.T. v. Independent School District No. 16*, 894 F.2d at 1193 (court recognized that liability could be predicated on school officials' deliberate indifference to constitutional rights, but found insufficient evidence of deliberate indifference). *Cf. J.O. v. Alton Community School District 11*, 909 F.2d 267, 272-73 & n. 4 (7th Cir. 1990)(suggesting that the court would find liability where school officials promulgated policies that fostered child abuse).[8] The standard adopted by the court of appeals is also akin to the deliberate indifference standard for determining the liability under Section 183 of a municipality which allegedly failed to carry out its responsibilities to train its employees. *See City of Canton v. Harris*, 479 U.S. 378 (1989).

Petitioners complain that by casting the *Jane Doe "A"* elements "in the form of an affirmative duty," the opinion of the court below is in conflict with the opinions of other courts which have rejected the concept of a duty to protect children based on a special relationship evolving from compulsory attendance laws. Pet. 15. However, a reading

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[8] Courts of appeals have recognized the deliberate indifference standard for establishing a supervisor's liability under Section 1983 outside the school setting as well. *See, e.g., Greason v. Kemp*, 891 F.2d 829, 836-37 & n.15 (11th Cir. 1990); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 902-03 (1st Cir. 1988); *Volk v. Coler*, 845 F.2d 1422, 1431 (7th Cir. 1988).

District courts have also applied the deliberate indifference standard in analyzing Section 1983 claims that school officials are responsible for the misconduct of subordinates. *See Viavant v. Steiner*, 1992 WL 59387 (E.D. La.); *Waechter v. School District No.14-030*, 773 F. Supp. 1005 (W.D. Mich. 1991); *Robert G. v. Newburgh City School District*, 1990 WL 3210 (S.D.N.Y.).

of the decision below shows that petitioners' complaint is about form and not substance. The court of appeals very narrowly circumscribed the duty it recognized. By requiring that the elements of *Jane Doe "A"* be satisfied, the court of appeals insured that school officials could be liable only for the constitutional invasion of children's rights by their subordinates, and not for the misconduct of private actors. As the court of appeals emphasized, its decision "does not mean that school officials are liable in the ordinary course for injuries to students inflicted by fellow students." Pet. App. A-21. The decision below is thus consistent with *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989), in which this Court held that, absent a custodial relationship, the due process clause does not require the State to protect its citizens from harm by private actors.

Contrary to petitioners' contention, the Fifth Circuit's decision is also consistent with the decisions in *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3d Cir. 1992)(en banc), *pet. for cert. filed*, No. 92-816 (U.S. Nov. 9, 1992), and *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), *pet. for cert. filed*, No. 92-1000 (U.S. Dec. 11, 1992). In those cases, neither of which involved sexual abuse by a teacher or other public employee, the courts held that school officials had no duty to protect students from injuries caused by private actors. *D.R. by L.R.*, 972 F.2d at 1374-76; *Maldonado*, 975 F.2d at 731.[9] Both courts distinguished their cases from the kind of situation present in this case and in *Stoneking II* and

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[9] Similarly, the district court decisions cited by petitioners as rejecting the Fifth Circuit position have involved misconduct by classmates and not by a state actor. *See Dorothy J. v. Little Rock School District*, 794 F.2d 1405, 1409 (E.D. Ark. 1992); *Elliott v. New Miami Board of Education*, 799 F. Supp. 818 (S.D. Oh. 1992); *Russell by Russell v. Fannin County School District*, 784 F. Supp. 1576 (N.D. Ga. 1992). *Cf. Doe v. Douglas County School District*, 770 F. Supp. 591 (D. Colo. 1991)(refusing to hold school district liable under duty to protect child from sexual abuse by psychologist but recognizing possible liability under a deliberate indifference standard).

recognized that school officials may be held liable for their deliberate indifference to sexual abuse committed by a subordinate. *D.R. by L.R.*, 972 F.2d at 1376; *Maldonado*, 975 F.2d at 730-31. Therefore, although the Fifth Circuit may have characterized a school official's obligations in terms of a duty to protect schoolchildren, it is in agreement with the Third, Eighth and Tenth Circuits on the predicates for holding those officials responsible for the sexual abuse of children under their care.[10]

In reality, the breadth of the court of appeals' language, of which petitioners complain, has no practical effect at all. The court adopted a well-established standard for determining petitioners' liability. The court's characterization of petitioners' responsibilities in terms of a duty to protect schoolchildren imposes no greater obligation on them than they would otherwise have as supervisors, nor does it make respondent's burden of proof any less onerous. Petitioners claim that they will have to "reckon with" the affirmative duty to protect at trial (Pet. 16, n.9), but they fail to state how the proof required of respondent is in any way diminished because of the analysis used by the court of appeals. Petitioners also claim that the court of appeals' decision has "opened a 'Pandora's box' of tort liability for school officials" (Pet. 18), but the court of appeals expressly restricted its decision to "constitutional wrongs, not tort principles" and utilized the *Jane Doe "A"* elements to "screen the lesser invasions from those of constitutional dimension." Pet. App. A-21-A-22. Therefore there is no

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10 Petitioners also allege that there is a conflict with the Seventh Circuit's decision in *J.O. v. Alton Community School District 11*, but that decision merely held that school officials could not be held responsible for failure to prevent child abuse simply by virtue of their special relationship with schoolchildren. 909 F.2d at 272. The court of appeals in this case agreed with that principle and required evidence that petitioners were deliberately indifferent to respondent's right not to be abused. The Seventh Circuit intimated that it too would accept such a standard. 909 F.2d at 273. *See also Volk v. Coler*, 845 F.2d at 1431.

reason for this Court to review the Fifth Circuit's dicta regarding the duty to protect, particularly since petitioners must stand trial in any event based on evidence of their failure to discipline their subordinate, Stroud, despite knowledge of his sexual misconduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the sexual molestation of a schoolchild by a public school teacher violates the due process and equal protection clauses of the Fourteenth Amendment.

2. Whether a public school superintendent and principal are liable under 42 U.S.C. 1983 where they acted with deliberate indifference to a schoolchild's constitutional right not to be sexually molested.

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As early as 1985, Petitioner Lankford and subsequently Petitioner Caplinger received complaints that Lynn Stroud, a teacher and coach at Taylor High School, engaged in sexually-oriented favoritism and inappropriate conduct of a sexual nature with female students. Pet. App. A-3, C-3-C-5. In the fall of 1986, Stroud became respondent's ninth-grade biology teacher and "began his seduction of her by writing suggestive comments on test papers" and kissing her on the cheek as she

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[1] The portion of the complaint quoted by petitioners (Pet. 5) omits paragraph 36 in which respondent alleged that petitioners "acted with deliberate and conscious indifference to [her] constitutional rights." Record on appeal, vol. II, p. 584.

was leaving the school field house. Pet. App. A-3. "Eventually, he began taking her into the laboratory room adjacent to the classroom and to the field house where he would kiss and touch her. " *Ibid.* He also called her out of other teacher's classrooms to engage in this behavior in the lab room. Pet. App. C-7-C-8.

Around Valentine's Day 1987, Stroud gave respondent a valentine in class on which he wrote, "'To my most favorite, prettiest, sweetest, nicest sweetheart in the world! Please don't change cause I need you. I'm in love with you. Forever - for real - I love you.'" Pet. App. A-3, C-8. A classmate, who had found the valentine, took it to the principal, Petitioner Lankford, and indicated that she thought that respondent and Stroud were sexually involved. Pet. App. A-4, C-8-C-9. Petitioner Lankford said he was aware of rumors and "that Stroud just had a way of flirting with the girls." Pet. App. A-4. Lankford transferred the classmate out of Stroud's class and did not investigate further. Soon thereafter, the superintendent, Petitioner Caplinger, who had received previous complaints of sexual misconduct by Stroud, learned "that Stroud was behaving 'unprofessionally' with [respondent] at a school basketball game." *Ibid.*

Stroud eventually persuaded respondent to have sexual intercourse with him in March or April of 1987. Pet. App. A-4-A-5, C-11. "Over the course of the next several months, Stroud and [respondent] had repeated sexual contact at different locations, both on and off the school grounds." Pet. App. A-5.[2]

In June 1987, two parents complained to Petitioner Caplinger that Stroud had behaved improperly with respondent and some other girls. They also complained "that Stroud exhibited favoritism toward female students in class." Pet.

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[2] Petitioners state that Lankford spoke with Stroud in the spring of 1987 (Pet. 4), but Stroud stated in his deposition that he did not recall anyone speaking to him and that he would have remembered had it occurred. Stroud Dep. 486-87.

App. A-5. Petitioner Caplinger did not discuss the complaint with respondent's parents, and no one mentioned the incident to Stroud. Pet. App. A-5, C-12.

In July 1987, respondent's parents found among her possessions photographs of Stroud with handwritten notes on the backs similar to those on the valentine. Respondent's parents immediately met with Petitioner Caplinger, who confirmed that he was aware of rumors concerning Stroud. Pet. App. A-6, C-12-C-13. Petitioners met separately with respondent and Stroud, each of whom denied that they were having a sexual relationship. Petitioner Lankford "warned Stroud that he would be fired 'if something was going on.'" Pet. App. A-6, C-13. Petitioners "were apparently satisfied that nothing was going on, based solely on the adamant denials of the alleged culprit (Stroud) and the 15 year-old victim . . . ." Pet. App. A-6.[3]

Although respondent and Stroud stayed apart for the remainder of the summer, he began walking her to classes after school started and they resumed having sexual intercourse. Pet. App. A-6, C-13. In October 1987, respondent's mother found more love letters from Stroud and consulted with their family lawyer, to whom respondent disclosed what had happened between her and Stroud. The attorney reported the abuse to Petitioner Caplinger, who on the same day received a complaint that Stroud had made unwelcome sexual advances toward another schoolgirl. Stroud was suspended and later pled guilty to criminal charges. Pet. App. A-7.

2. In a lengthy opinion, the district court denied petitioners' motion for summary judgment on their defense of qualified immunity. The district court held that the sexual moles-

[3] Petitioners claim, without citation to the record, that Caplinger concluded that he did not have enough evidence to discharge Stroud, and they suggest that this was upon advice of counsel. Pet. 4. However, petitioners refused to reveal information about advice from counsel. Caplinger Dep. 139. Moreover, Caplinger stated at his deposition that he did not recommend Stroud's termination because he had not given Stroud a directive not to communicate with respondent. *Id.* at 191-92.

tation respondent suffered violated her clearly established constitutional right to be free from bodily harm and sexual harassment at school. Finding material factual issues in dispute, the district court held that while petitioners may not have had a duty to protect respondent, "they certainly had a duty to respond to the parents, teachers, students and fellow administrators' blatant protests against the offender's conduct." Pet. App. C-22. The district court concluded that the evidence raised a reasonable question of fact as to whether petitioners "tolerate[d] Stroud's abuse to the point that they actually condoned the abuse. . . ." *Ibid.*

3. On interlocutory appeal the court of appeals affirmed the denial of summary judgment and remanded the case for trial. The court of appeals held that respondent "had a firmly established constitutional right under the due process and equal protection clauses of the Fourteenth Amendment to be free from sexual molestation by a state-employed schoolteacher." Pet. App. A-2. With respect to respondent's due process claim, the court of appeals reasoned "that bodily integrity is necessarily compromised when a state actor sexually assaults a schoolchild. . . and that such misconduct implicates due process." Pet. App. A-12. With respect to her equal protection claim, the court held that sexual harassment in the school setting is sex discrimination proscribed by the equal protection clause. Pet. App. A-24.

Turning to the issue of petitioners' liability, the court of appeals determined that school officials have both "a duty to police the misconduct of their subordinates and [a duty] to protect schoolchildren from hazards of which the school officials know or should know. Their deliberate indifference to these duties can form the basis of liability against them." Pet. App. A-21. The court of appeals cautioned that "[t]his does not mean that school officials are liable in the ordinary course for injuries to students inflicted by fellow students." *Ibid.* Rather, school officials are liable only for invasions "of

constitutional dimensions" and only when the elements of *Jane Doe "A" v. Special School District of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990), are met, including notice of and demonstrated deliberate indifference to a pattern of unconstitutional acts. Pet. App. A-22; *see also* Pet. App. A-14.

The court of appeals held that petitioners could be found liable based on the evidence of their deliberate indifference to a known pattern of misconduct by Stroud. Pet. App. A-22-A-23. The court concluded that summary judgment was inappropriate because "a jury could find that [petitioners] *non*feasance...was not merely negligent, but grossly negligent, reckless, or deliberately (consciously) indifferent; that [petitioners'] toleration of Stroud's alleged misconduct for so long communicated their tacit condonation of his *mal*feasance." Pet. App. A-24. Finally, the court of appeals held that the same analysis requires sending respondent's equal protection claim to the jury as well. Pet. App. A-24-A-25.

ARGUMENT

1. Every court of appeals that has reviewed a case of sexual molestation of a schoolchild by a teacher or other public employee has agreed with the court of appeals in this case that such abuse violates the child's Fourteenth Amendment rights. *See D.T. by M.T. v. Independent School District No. 16*, 894 F.2d 1176, 1187 (10th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 213 (1990); *Stoneking v. Bradford Area School District*, 882 F.2d 720, 726-27 (3d Cir. 1988), *cert. denied*, 493 U.S. 1044 (1990) *(Stoneking II)*.[4] Therefore,

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[4] *See also Jane Doe "A" v. Special School District of St. Louis County*, 901 F.2d 642 (8th Cir. 1990)(implicitly assuming that sexual abuse of school children by a school employee would be unconstitutional).

District courts have likewise found sexual abuse by a public school employee to offend the due process guarantees of the Constitution. *Viavant v. Steiner*, 1992 WL 59387 (E.D. La.); *Robert G. v. Newburgh City School District*, 1990 WL 3210 (S.D.N.Y.).

no conflict exists among the circuits warranting review by this Court on the issue presented to and decided by the court below, namely whether a public schoolchild possesses a constitutional right not to be sexually molested by her teacher. Moreover, the unanimous view of the courts of appeals is correct and in accord with the principle, recognized by this Court in *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977), that the due process clause protects against unjustified state intrusion into the bodily integrity of schoolchildren.[5]

Indeed, petitioners "do not dispute that public school students arguably enjoy a constitutional right to be free from sexual molestation by a state-employed school teacher which occurs during the course of school attendance or school related activities." Pet. 9. Petitioners complain, however, that the court of appeals did not make distinctions concerning the place and time of the sexual abuse. Petitioners themselves failed to raise these distinctions in either of the courts below. Specifically, petitioners did not argue, as they do before this Court, that the constitutional right alleged by respondent should be applicable only to abuse which occurs in connection with school attendance, nor did petitioners argue that respondent's ninth-grade teacher Stroud was not acting under color of state law when he molested her. Petitioners did not even cite in their briefs to the court of appeals the case on which they now chiefly rely for their argument on this issue—*D.T. by M.T. v. Independent School District No. 16, supra. See* Pet. 13-14. Having failed to raise below the issue of whether the right to be free from sexual abuse should be "qualified" according to the time and location of the abuse, petitioners are

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[5] The court of appeals' decision also correctly recognizes that sexual harassment and sexual abuse constitute intentional sex discrimination, which is a violation of the equal protection clause of the Fourteenth Amendment. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988); *Volk v. Coler*, 845 F.2d 1422, 1431 (7th Cir. 1988). *See also Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S.Ct. 1028, 1037 (1992)(sexual harassment and abuse of a student is intentional discrimination based on sex).

precluded from raising it for the first time in this Court. *See Sonzinsky v. United States*, 300 U.S. 506, 514 (1937); *Houghton v. Jones*, 68 U.S. 702, 705 (1863).

Furthermore, respondent was sexually harassed and abused during school hours, in connection with school activities and on school property. Among other things, Stroud showed sexual favoritism toward female students in class, wrote suggestive comments on respondent's test papers, and gave her a suggestive valentine in class. He kissed and touched respondent in a sexual manner in the lab room next to his classroom during class hours, sometimes taking her out of other classes to do so. Pet. App. A-3, C-7-C-8. Stroud acted inappropriately with respondent at a school basketball game and had sexual intercourse with her in the school fieldhouse, sometimes after school games. Pet. App. A-4-A-5, C-11, C-13-C-14. Thus, the distinction petitioners seek to make "between sexual molestation which occurs in connection with school attendance and that which does not" (Pet. 12) makes no difference to the outcome of this case since respondent in fact suffered sexual abuse in connection with school attendance.[6]

Moreover, the analysis suggested by petitioners — that respondent's due process and equal protection rights should be qualified or restricted — is not supported by any of the case law cited by petitioners nor by any other authority to respondent's knowledge. Rather, the proper analytical framework is that utilized by the Tenth Circuit in *D.T. by M.T. v. Independent School District No. 16*. There, the court, following established precedent, looked to see whether sexual abuse allegedly unconnected to a teacher's public employment was

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[6] If petitioners are suggesting that the abuse respondent suffered in connection with her school attendance did not rise to the level of a constitutional violation, petitioners are wrong. As the evidence summarized above shows, Stroud harassed, physically assaulted and molested respondent in a variety of places at school, including in the lab and the school fieldhouse. These invasions of her bodily integrity and incidents of sexual harassment clearly violated her rights to due process and equal protection of the law.

committed "under color of state law." 894 F.2d at 1186-1192.[7] The Fifth Circuit did not address this issue presumably because it was not raised by petitioners. Therefore, the decision below is not in conflict with *D.T. by M.T.*.

There is also no conflict because the facts of this case are radically different from those in *D.T. by M.T.*. The Tenth Circuit found an insufficient nexus to the school district because the abuse in that case occurred during the summer when the teacher had no contractual obligations to the district and he was on a private fund-raising trip unrelated to the school. 894 F.2d at 1182-83, 1187-88. In this case respondent was victimized by one of her public school teachers during the school year and at times even during class hours, thus creating the nexus to state action which was lacking in *D.T. by M.T.*. *See also Stoneking II*, 882 F.2d at 722, 726-27 (band director's sexual molestation of a student violated her clearly established constitutional rights although some of the acts of abuse occurred in his car or in his house).

In sum, review of the first question presented by petitioners, *viz* whether a student has an "unqualified" right to be free from sexual abuse by a teacher, is unwarranted because there is no conflict in the circuits on the issue, it was not raised below, it does not affect the outcome of the case, and petitioners' unique analytical approach is unsound and unworkable.

2. Petitioners also seek review of the Fifth Circuit's conclusion that they can be held liable for injuries to respondent caused by breach of their duty to protect her from known constitutional violations. The court of appeals held, in the alternative, that petitioners could also be held liable for breach

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[7] The proper analysis in determining whether there has been a violation of 42 U.S.C. 1983 is to inquire "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1980), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986).

of their duty" to police the misconduct of their subordinates. . . ." Pet. App. A-21. Petitioners do not challenge the latter holding. However, the standards outlined by the court of appeals for establishing liability based on a duty to protect are the same as the standards for finding supervisory liability, which petitioners accept as correct. The standards are also the same as those adopted by other courts of appeals that have reviewed the issue of a school official's liability for sexual abuse by a subordinate.

Specifically, the court of appeals held that school officials are liable for the constitutional wrongs done to schoolchildren, under either of its two alternative theories (breach of duty to protect or breach of duty to supervise), only upon proof of the four elements set forth in *Jane Doe "A" v. Special School District of St. Louis County,* 901 F.2d 642, 645 (8th Cir. 1990). Pet. App. A-21-A-22. Those four requirements are that 1) the school officials had "notice of a pattern of unconstitutional acts by subordinates," 2) they were deliberately indifferent to those offensive acts, 3) they "failed to take sufficient remedial action" and 4) their failure proximately caused the child's injuries. 901 F.2d at 645; *see also* Pet. App. A-14. The *Jane Doe "A"* "deliberate indifference" standard adopted by the Eighth and Fifth Circuits is consistent with the standards recognized by other circuits for establishing school officials' Section 1983 liability. *See Stoneking II,* 882 F.2d at 725 (school officials may be held liable based on "policies maintained in deliberate indifference to actions taken by subordinates"); *See also D.T. by M.T. v. Independent School District No. 16,* 894 F.2d at 1193 (court recognized that liability could be predicated on school officials' deliberate indifference to constitutional rights, but found insufficient evidence of deliberate indifference). *Cf. J.O. v. Alton Community School District 11,* 909 F.2d 267, 272-73 & n. 4 (7th Cir. 1990)(suggesting that the court would find liability where school officials promulgated policies that

fostered child abuse).[8] The standard adopted by the court of appeals is also akin to the deliberate indifference standard for determining the liability under Section 183 of a municipality which allegedly failed to carry out its responsibilities to train its employees. *See City of Canton v. Harris,* 479 U.S. 378 (1989).

Petitioners complain that by casting the *Jane Doe "A"* elements "in the form of an affirmative duty," the opinion of the court below is in conflict with the opinions of other courts which have rejected the concept of a duty to protect children based on a special relationship evolving from compulsory attendance laws. Pet. 15. However, a reading of the decision below shows that petitioners' complaint is about form and not substance. The court of appeals very narrowly circumscribed the duty it recognized. By requiring that the elements of *Jane Doe "A"* be satisfied, the court of appeals insured that school officials could be liable only for the constitutional invasion of children's rights by their subordinates, and not for the misconduct of private actors. As the court of appeals emphasized, its decision "does not mean that school officials are liable in the ordinary course for injuries to students inflicted by fellow students." Pet. App. A-21. The decision below is thus consistent with *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 200 (1989), in which this Court held that, absent a custodial relationship, the due process clause does not require the State to protect its citizens from harm by private actors.

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[8] Courts of appeals have recognized the deliberate indifference standard for establishing a supervisor's liability under Section 1983 outside the school setting as well. *See, e.g., Greason v. Kemp,* 891 F.2d 829, 836-37 & n.15 (11th Cir. 1990); *Lipsett v. University of Puerto Rico,* 864 F.2d 881, 902-03 (1st Cir. 1988); *Volk v. Coler,* 845 F.2d 1422, 1431 (7th Cir. 1988).

District courts have also applied the deliberate indifference standard in analyzing Section 1983 claims that school officials are responsible for the misconduct of subordinates. *See Viavant v. Steiner,* 1992 WL 59387 (E.D. La.); *Waechter v. School District No.14-030,* 773 F. Supp. 1005 (W.D. Mich. 1991); *Robert G. v. Newburgh City School District,* 1990 WL 3210 (S.D.N.Y.).

Contrary to petitioners' contention, the Fifth Circuit's decision is also consistent with the decisions in *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3d Cir. 1992)(en banc), *pet. for cert. filed*, No. 92-816 (U.S. Nov. 9, 1992), and *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), *pet. for cert. filed*, No. 92-1000 (U.S. Dec. 11, 1992). In those cases, neither of which involved sexual abuse by a teacher or other public employee, the courts held that school officials had no duty to protect students from injuries caused by private actors. *D.R. by L.R.*, 972 F.2d at 1374-76; *Maldonado*, 975 F.2d at 731.[9] Both courts distinguished their cases from the kind of situation present in this case and in *Stoneking II* and recognized that school officials may be held liable for their deliberate indifference to sexual abuse committed by a subordinate. *D.R. by L.R.*, 972 F.2d at 1376; *Maldonado*, 975 F.2d at 730-31. Therefore, although the Fifth Circuit may have characterized a school official's obligations in terms of a duty to protect schoolchildren, it is in agreement with the Third, Eighth and Tenth Circuits on the predicates for holding those officials responsible for the sexual abuse of children under their care.[10]

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[9] Similarly, the district court decisions cited by petitioners as rejecting the Fifth Circuit position have involved misconduct by classmates and not by a state actor. *See Dorothy J. v. Little Rock School District*, 794 F.2d 1405, 1409 (E.D. Ark. 1992); *Elliot v. New Miami Board of Education*, 799 F. Supp.818 (S.D. Oh. 1992); *Russell by Russell v. Fannin County School District*, 784 F. Supp. 1576 (N.D. Ga.1992). *Cf. Doe v. Douglas County School District*, 770 F. Supp. 591 (D. Colo. 1991) (refusing to hold school district liable under duty to protect child from sexual abuse by psychologist but recognizing possible liability under a deliberate indifference standard).

[10] Petitioners also allege that there is a conflict with the Seventh Circuit's decision in *J.O. v. Alton Community School District 11*, but that decision merely held that school officials could not be held responsible for failure to prevent child abuse simply by virtue of their special relationship with schoolchildren. 909 F.2d at 272. The court of appeals in this case agreed with that principle and required evidence that petitioners were deliberately indifferent to respondent's right not to be abused. The Seventh Circuit intimated that it too would accept such a standard. 909 F.2d at 273. *See also Volk v. Coler*, 845 F.2d at 1431.

In reality, the breadth of the court of appeals' language, of which petitioners complain, has no practical effect at all. The court adopted a well-established standard for determining petitioners' liability. The court's characterization of petitioners' responsibilities in terms of a duty to protect schoolchildren imposes no greater obligation on them than they would otherwise have as supervisors, nor does it make respondent's burden of proof any less onerous. Petitioners claim that they will have to "reckon with" the affirmative duty to protect at trial (Pet. 16, n.9), but they fail to state how the proof required of respondent is in any way diminished because of the analysis used by the court of appeals. Petitioners also claim that the court of appeals' decision has "opened a 'Pandora's box' of tort liability for school officials" (Pet. 18), but the court of appeals expressly restricted its decision to "constitutional wrongs, not tort principles" and utilized the *Jane Doe "A"* elements to "screen the lesser invasions from those of constitutional dimension." Pet. App. A-21-A-22. Therefore there is no reason for this Court to review the Fifth Circuit's dicta regarding the duty to protect, particularly since petitioners must stand trial in any event based on evidence of their failure to discipline their subordinate, Stroud, despite knowledge of his sexual misconduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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